SUMMARY OF LITIGATION AFFECTING THE GENERAL ASSEMBLY AS OF OCTOBER 3, 2012

I. Litigation in which either the General Assembly has been named as a party or a member of the General Assembly has been named as a party:

A. *Colorado Republican Party v. Benefield, et. al.*, Denver District Court, Case Number 06-CV-3565.

Subject: Open Records request and related claim for attorney fees.

Background/Issue: This matter began in 2006 when the Colorado Republican Party ("CRP") made a request under the Colorado Open Records Act ("CORA") of several Democratic members of the House of Representatives (collectively referred to as "Representatives") requesting a copy of documentation relating to an entity identified as Research & Democracy ("R & D") and all contributions received into and expenditures made from any office accounts maintained by the Representatives related to R & D.

On April 10, 2007, the Denver District Court held that certain constituent survey responses obtained and used by the Representatives are public records subject to disclosure under CORA and that the survey responses do not create an expectation of confidentiality on the part of the constituents. The Court ordered that the Representatives produce all of the documents requested by CRP except for the redacting of any information where the constituent specifically requested that the information be kept confidential.

On October 23, 2008, the Colorado Court of Appeals reversed the District Court and remanded the case back to the District Court with directions to review each completed survey *in camera* to determine if the constituent expects it to be confidential. To guide the Court on remand, the Court of Appeals identified several categories of surveys, recognizing there may be more, and determined whether those categories were confidential or not. Subsequently, Counsel for CRP extended a settlement offer and Counsel for the Representatives made a counteroffer to which they never received a response.

Status: On February 10, 2010, the Representatives produced certain surveys to the CRP that are not confidential under the Court of Appeals' guidelines and withheld others as confidential. Thereafter, CRP challenged the propriety of the Representatives' production, and further requested an order that the

Representatives' withholding of public records was not proper under CORA.

Ultimately, it became clear that the majority of surveys in the litigation were either properly withheld or made available. On September 7, 2010, the District Court concluded on remand that the Representatives had correctly sorted, produced, and withheld the surveys at issue and had properly complied with the Court of Appeals' order. The Court declined to enter a final order regarding fees but directed the parties to brief the issue whether the CRP is entitled to fees under CORA, which the parties subsequently did.

By order dated October 28, 2010, the District Court denied CRP's motion for reasonable costs and attorney fees, finding that the Representatives' response to CRP's request was proper and that CRP was not a prevailing applicant within the meaning of the CORA provision upon which CRP relied for payments of its fees. The Court considered the relative strengths and weaknesses of each party's success over the course of 4 years of litigation and concluded that neither is a prevailing party and that CRP is not a prevailing applicant.

Subsequently, CRP appealed the district court's order denying its motion for attorneys fees and costs to the Court of Appeals. On or about May 16, 2011, CRP filed its opening brief in the appeal. On June 30, 2011, the Representatives filed their answer brief. In their answer brief, the Representatives argue that: 1) The district court correctly found that the Representatives' denial of inspection of the constituent surveys was proper and the court did not abuse its discretion in concluding that CRP was not a prevailing party within the meaning of section 24-72-204 (5), C.R.S.; 2) because the Representatives acted diligently, in good faith, and properly submitted all of the surveys to the court for review, CRP is also not entitled to a fee and cost award under section 24-72-204 (6), C.R.S.; and 3) CRP's request for a specific amount of fees and costs is not properly before the Court of Appeals. CRP was granted an extension of time through and including July 19, 2011, in which to file its reply brief.

Oral arguments in the case were held before the Court of Appeals on October 3, 2011.

The Court of Appeals issued its written opinion on November 10, 2011. The Court held that a party who obtains disclosure of an improperly withheld public record after bringing a section 24-72-204 (5), C.R.S., action is a

prevailing applicant, who must be awarded court costs and reasonable attorney fees unless a statutory provision precludes the award of such amount. Because CRP succeeded in obtaining the right to inspect documents it sought from the Representatives, the Court held that it is a prevailing applicant within the meaning of the statutory provision. The Court of Appeals also held that the Representatives were not sheltered by the safe harbor provision under section 24-72-204 (6) from the imposition of attorney fees. The Court concluded that the Representatives' belief that the survey responses clearly implied an expectation of confidentiality is incompatible with the statutory requirement for the safe harbor provision, which is an inability to make a determination as to the requirement to disclose. Finally, the Court of Appeals remanded the case to the trial court for a determination of the amount of costs and fees to be awarded to CRP.

On January 25, 2012, the Representatives filed a Petition for Writ of Certiorari with the Colorado Supreme Court to appeal the Court of Appeals' ruling in favor of CRP. The issue presented for review is whether the Court of Appeals erred in ruling that, under CORA, if a court orders the inspection of even one improperly withheld public record, the requesting party is a "prevailing applicant" entitled to attorney fees and costs.

The Representatives argued that the Supreme Court should grant certiorari because: 1) The Court of Appeals decided a critical issue of first impression in a manner that divests trial courts of their traditional, policy-based discretion to determine which party, if any, prevailed under fee-shifting contracts and statutes; and 2) the decision will have far-reaching impacts on public records custodians, including state and local government entities and officials who will be liable for applicants' fees if, in response to requests for multiple records, they mistakenly withhold even one record. The CRP filed its opposition brief on February 8, 2012, and argued that there is no issue of first impression, the Court of Appeals' ruling does not interfere with the trial court's discretion, and any impact on public records custodians is due to the plain language of CORA. The Representatives filed their reply brief on February 15, 2012, which argued that CRP did not address the salient points of the Representatives' petition and failed to provide any valid reason for the Supreme Court to decline reviewing the ruling of the Court of Appeals.

On September 24, 2012, the Supreme Court granted Representatives' Petition for Writ of Certiorari.

Counsel of record: The Representatives' counsel are Maureen Reidy Witt and Jonathan S. Bender of Holland & Hart LLP. CRP is represented by John. S. Zackem of Zackem Law, LLC.

Staff members monitoring this case: Dan Cartin, Sharon Eubanks, and Bob Lackner.

****

B. *Donahue v. McCann, et. al.,* Denver District Court, Case Number 12-CV-2725.

Subject: Constitutionality of House Bill 12-1358, "Concerning funding issues related to medical marijuana, and, in connection therewith, making an appropriation."

Background/Issue: On May 3, 2012, Plaintiff Corey Donahue ("Donahue") filed a civil complaint against Representatives Beth McCann and Tom Massey.[1] Donahue alleged that House Bill 12-1358, which McCann and Massey jointly sponsored as prime House sponsors, would, if enacted, violate Article XVIII, section 14 (3) (i) of the Colorado constitution, which allows the state to impose "reasonable fees" to pay for its "direct or indirect administrative costs" associated with the administration of the medical marijuana program by authorizing the state to use some of its revenue generated by such fees for purposes other than the payment of such costs. Donahue sought an injunction against the enactment of House Bill 12-1358.

On May 9, 2012, the last day of the 2012 Regular Session of the General Assembly, the Senate laid over House Bill 12-1358 until May 10, 2012, which permanently prevented the enactment of the bill. On May 25, 2012, McCann and Massey filed a motion to dismiss Donahue's complaint on the grounds that: (1) The court lacked subject matter jurisdiction over the case under the mootness doctrine because House Bill 12-1358 could no longer be enacted and it would therefore not be possible for the Court to grant the injunctive relief

[1] Donahue also named the Governor and the Executive Directors of the Departments of Revenue and Public Health and Environment as Defendants, seeking to enjoin the Governor from signing House Bill 12-1358 and the Departments from enforcing its provisions. But he never actually served the complaint on the Governor or the Executive Directors. As his claim against those Defendants depended upon the General Assembly actually enacting HB 13-1258, which it did not, they do not merit further discussion here.

requested by Donahue; and (2) Article III of the Colorado constitution, which provides for the separation of powers of state government, prohibited the court from ordering the General Assembly to enact or not enact any particular piece of legislation.

Status: On June 21, 2012, the Denver District Court issued an order granting McCann and Massey's motion to dismiss Donahue's complaint on the grounds that the case was moot because the General Assembly's action in laying over House Bill 12-1358 eliminated any actual controversy and because Article III of the Colorado constitution prohibited the court from ordering the General Assembly to not adopt a bill. Donahue did not appeal the dismissal order, and the case is at an end.

Counsel of record: Plaintiff Donahue appeared *pro se.* Dan Cartin and Jason Gelender of the Office of Legislative Legal Services represented Defendants Beth McCann and Tom Massey.

Staff member monitoring this case: Jason Gelender.

****

C. Campaign to Regulate Marijuana Like Alcohol and Vicente v. State of Colorado and Colorado General Assembly, et. al., Denver District Court, Case No. 12-CV-5578.

Subject: Legal challenge to wording contained in the 2012 ballot information book ("Blue Book") pertaining to Amendment 64 (marijuana legalization).

Background/Issue: On or about September 9, 2012, the Proponents of Amendment 64, the ballot measure concerning marijuana legalization, filed a complaint in Denver District Court claiming that the Blue Book analysis of Amendment 64 was not fair and impartial as required by Article V, Section 1 (7.5) (a) of the Colorado constitution and section 1-40-124.5 (1.7) (a), Colorado Revised Statutes. The Proponents claimed that the removal of three sentences from the arguments for the measure, which resulted from a two-thirds vote of the members of the Legislative Council at its meeting on September 5, 2012, was erroneous and did not reflect the formal actions and true intent of the Legislative Council. The Proponents sought a temporary restraining order and a preliminary injunction to prevent the printing of the Blue Book without the three sentences and an order compelling the state of

Colorado, the Colorado General Assembly, and Mike Mauer and Amy Zook of Legislative Council Staff (collectively "Defendants"), to hold another vote on the removal of the three sentences or, in the alternative, an order compelling Defendants to include the three sentences prior to printing the Blue Book.

Defendants moved to dismiss Proponents' complaint on the grounds that the separation of powers doctrine prohibits the court from interfering in the Blue Book process, section 1-1-113, Colorado Revised Statutes, does not provide a remedy to the proponents, and the General Assembly is immune from suit under the speech and debate clause of the Colorado constitution.[2]

During a hearing in Denver District Court on September 12, 2012, Chief Judge Robert Hyatt granted the motion to dismiss filed on behalf of the Defendants. In granting the motion to dismiss, Judge Hyatt found that, in the absence of any statutory or constitutional grant of jurisdiction, the court cannot interfere in the legislative process and substitute its judgment for the judgment of the General Assembly. See *Polhill v. Buckley*, 923 P.2d 119 (Colo. 1996). Judge Hyatt also held that section 1-1-113, Colorado Revised Statutes, does not give jurisdiction to the courts to intervene in the Blue Book process as this section only applies to the Election Code and section 1-40-124.5, Colorado Revised Statutes, is not contained in the Election Code. Previous district court rulings in 2004, 2006, and 2010 were cited by Judge Hyatt in which similar findings were made and the courts in these prior cases similarly declined to become involved in the Blue Book process. Judge Hyatt additionally held that there is no statutory authority granting the court jurisdiction to hear this controversy, and he declined to violate either the letter or the spirit of the doctrine of separation of powers.

After the court issued its ruling and dismissed the complaint, the attorney for the Amendment 64 proponents, Robert Corry, made statements to the court indicating that the Proponents may file a new complaint alleging that section 1-40-124.5 (1.7), C.R.S., violates the language of Article V, Section 1 (7.5) of the Colorado constitution on its face and as applied in the situation involving the Blue Book analysis of Amendment 64. It appears the Proponents would argue that the ability of the Legislative Council to make any changes to the draft Blue Book prepared by Legislative Council staff violates the constitutional requirement that the nonpartisan research staff of the general

[2] Proponents agreed to dismiss defendant the state of Colorado from the case without prejudice for purposes of the motion to dismiss.

assembly prepare and make available to the public a ballot information booklet.

Status: Upon the order granting the motion to dismiss, the 2012 Blue Book in the form approved by the Legislative Council was sent to the printers and the document is in the process of being mailed to Colorado electors. As of today's date, Proponents have not filed a complaint asserting new claims or taken other action in response to the granting of Defendants' motion to dismiss.

Counsel of record: Proponents' counsel was Robert Corry and Travis Simpson. Defendant General Assembly, Mr. Mauer, and Ms. Zook were represented by Richard Kaufman of Ryley Carlock & Applewhite. Defendant the state of Colorado was represented by David Blake, Deputy Attorney General.

Staff members monitoring this case: Dan Cartin and Sharon Eubanks.

****

II. Litigation of interest to members of the General Assembly:

A. *Lobato v. State*, Denver District Court, Case Number 05-CV-4794.

Subject: Constitutionality of present system of financing public education.

Background/Issue: On June 23, 2005, 124 individual parents and school children and 14 school districts (collectively referred to as "Plaintiffs") filed an action in Denver District Court against the state of Colorado, the state board of education, Commissioner of Education Maloney, and Governor Owens (collectively "Defendants").

In their complaint, Plaintiffs allege that: 1) The state school finance system fails to provide sufficient funding to all school districts in the state to assure that students receive their constitutional right to a quality education, and fails to provide sufficient funding to meet state and federal standards and that this failure to provide such funding violates the provisions of the thorough and uniform education clause in the Colorado constitution; 2) The combination of inadequate funding and the mandates and punitive enforcement provisions in state law violates the local control provision of the state constitution because it prevents school districts from exercising meaningful local control over

instruction; and 3) The school finance system violates the uniform taxation guarantee of the state constitution. Plaintiffs request that the court enter interim and permanent injunctions compelling the defendants to establish, fund, and maintain a thorough and uniform system of public schools and to provide sufficient funds to finance the public school system.

On August 24, 2005, Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. On March 26, 2006, the Denver District Court found that Plaintiffs' complaint fails to prove any facts in support of their claim that would entitle them to relief and granted the Defendants' motion to dismiss on all claims.

Plaintiffs subsequently appealed the case to the Colorado Court of Appeals. On January 24, 2008, the Court of Appeals upheld the District Court's dismissal of the case.

In a decision issued on October 19, 2009, the Colorado Supreme Court reversed the decision of the Colorado Court of Appeals. Specifically, the Supreme Court held that the Court of Appeals should not have addressed the issue of the school districts' standing, as it is unnecessary to address the standing of a party bringing the same claim as another party for whom standing has already been established. In this case, the Plaintiff school districts made the same claims as the Plaintiff parents, and the standing of the Plaintiff parents was never in question.

The Supreme Court also rejected Defendants' arguments regarding whether the Plaintiffs present a justiciable question for relief. The Court was required to accept Plaintiffs' factual allegations as true because the case was dismissed before evidence was presented. Based on Plaintiffs' allegations, the Court held that their constitutional challenges to the state's public school financing scheme are justiciable.

The Supreme Court stated that it is the judiciary's responsibility to determine whether the state's public school financing system is rationally related to the constitutional mandate that the General Assembly provide a thorough and uniform system of public education. This kind of rational basis review satisfies the judiciary's obligation to evaluate the constitutionality of the state's public school system without unduly infringing on the General Assembly's policymaking authority. The Court stated that the role of the judiciary is not to determine whether a better system of financing public schools could be

devised, but to determine whether the current system passes constitutional muster. The Court further stated that Amendment 23 does not affect whether Plaintiffs present a justiciable claim for relief. Amendment 23 prescribes minimum increases for state funding for public education, but was not intended to qualify, quantify, or modify the thorough and uniform mandate in the Colorado constitution.

Accordingly, the Colorado Supreme Court held that Plaintiffs must be provided with an opportunity to prove their allegations. The Court stated that to be successful, Plaintiffs must prove that the state's current public school financing system is not rationally related to the General Assembly's constitutional mandate to provide a thorough and uniform system of public education. The Court stated that on remand, the trial court must give substantial deference to the General Assembly's fiscal and policy judgments. If the trial court finds that the current system of public school finance is irrational and, therefore, unconstitutional, it must give the General Assembly a reasonable amount of time to change the funding system to bring it into compliance with the requirements of the Colorado constitution.

Status: On March 1, 2010, Plaintiffs filed an amended complaint adding the Jefferson County School District and Colorado Springs District 11 and parents from Denver Public Schools to the case. On July 1, 2010, the parties filed documents concerning required disclosures and case management. A 5-week trial to the court began in August 2011 and was concluded in early September 2011.

On December 9, 2011, the Denver District Court issued its ruling. In a 183-page written order, the Court concluded that "the Colorado public school financing system is not rationally related to the mandate to establish and maintain a thorough and uniform system of free public schools. This results in a denial of the rights of Individual Plaintiffs guaranteed by Article IX, section 2 of the Colorado constitution and the rights and powers of the School Districts pursuant to Article IX, sections 2 and 15." Accordingly, the Court finds that the Colorado public school finance system is unconstitutional.

The Denver District Court went on to hold that "[e]vidence establishes that the finance system must be revised to assure that funding is rationally related to the actual costs of providing a thorough and uniform system of public education. It is also apparent that increased funding will be required." The Court enjoined the Defendants "from adopting, implementing, administering,

or enforcing any and all laws and regulations that fail to establish, maintain, and fund a thorough and uniform system of free public schools that fulfils the qualitative mandate of the Education Clause and the rights guaranteed to Plaintiffs thereunder and that is in full compliance with the requirements of the Local Control Clause. . . . The Defendants are further enjoined to design, enact, find, and implement a system of public school finance that provides and assures that adequate, necessary and sufficient funds are available in a manner rationally related to accomplish the purposes of the Education Clause and the Local Control Clause." The Court then stayed the enforcement of the injunctive relief it ordered to provide the State a reasonable time to create and implement a system of public finance that satisfies the requirements of the Education Clause and the Local Control Clause. The stay is to continue in effect until final action by the Colorado Supreme Court; if no appeal is perfected, the Court shall review the stay no earlier than the conclusion of the 2012 legislative session. Until further action by the Colorado Supreme Court, the present financing formula and funding may remain in effect.

The Defendants appealed the District Court's order to the Supreme Court. In his opening brief, the Attorney General presented three arguments for why the Supreme Court should reverse the decision of the trial court: 1) The issue of whether state funding for education is adequate is a political question that the Court cannot answer without violating the separation of powers doctrine; 2) The trial court did not give deference to the General Assembly's policy and funding decisions in determining whether such decisions are rationally related to providing a thorough and uniform education system; and 3) School districts are not entitled to full state funding to implement state educational mandates.

The Defendants' opening brief was filed July 18, 2012. A number of different persons and organizations filed amicus briefs supporting the Defendants' position.[3] Plaintiffs' answer brief was due September 26, 2012. Briefs from amicus parties in support of Plaintiffs were also due September 26, 2012.

Counsel of record: Kathleen Gebhart, Alexander Halpern, and attorneys from the law firm of Davis Graham and Stubbs, LLP are representing Plaintiffs. The Defendants are represented by the Attorney General's Office.

---

[3] Those persons and organizations filing amicus briefs in support of the Defendants' position in the lawsuit include the Colorado League of Charter Schools and the National Alliance for Public Charter Schools, Colorado Concern, the Regents of the University of Colorado, the Colorado Behavioral Healthcare Council and Alliance, and former Governors Lamm, Owens, and Ritter.

Staff member monitoring the case: Nicole Myers.

****

B. *Justus v. PERA, et. al.*, Denver District Court, Case Number 10-CV-1589.

Subject: Constitutionality of SB 10-001, "Concerning Modifications to the Public Employees' Retirement Association Necessary to Reach a One Hundred Percent Funded Ratio Within the Next Thirty Years."

Background/Issue: On February 26, 2010, an initial class action complaint was filed in Denver District Court. On March 17, 2010, an amended class action complaint was filed in Denver District Court by a Denver public schools retiree and two Public Employees' Retirement Association (PERA) retirees, all of whom currently receive a pension benefit from PERA, and by an active PERA member who was eligible to receive a full pension benefit from PERA as of February 28, 2010. The complaint challenges the legality of certain sections of Senate Bill 10-001, i.e., sections 19 and 20, which modified the PERA statutes with respect to the annual cost of living adjustments (COLA) for PERA beneficiaries. The defendants are the state, PERA, and Governor Ritter, Mark J. Anderson, and Sara R. Alt in their official capacities only.

Among Plaintiffs' claims:

1) Sections 19 and 20 violate the contract clause of the Colorado constitution and United States Constitution, respectively. Specifically, sections 19 and 20 violate their contractual right to annual adjustment of their pension at the levels specified under Colorado law when their pension rights vested or when they actually retired. Therefore, sections 19 and 20 violate the federal and state constitutional contract clauses because they diminish the benefits of PERA members who have vested rights to a pension in a greater amount than they will actually receive.

2) Sections 19 and 20 violate section 38 of article V of the Colorado constitution, which provides that an obligation or liability of any person that is held or owned by the state shall not be diminished by the General Assembly and such liability or obligation shall not be extinguished except by payment. Plaintiffs argue that the benefits of PERA members, who have a right to a greater pension than they will ultimately receive, have been diminished by

sections 19 and 20 and therefore those sections are in violation of said section 38.

3) Sections 19 and 20 violate the takings clause of the Fifth Amendment of the United States Constitution, which provides that "private property [shall not] be taken for public use, without just compensation". Plaintiffs argue that they had a legitimate expectation that they would receive annual pension increases at the levels specified by the PERA and Denver public schools retirement system plans in effect when they became eligible to retire or when they retired, and because sections 19 and 20 diminish the vested pension benefits of PERA members without just compensation, those sections violate the takings clause.

4) Sections 19 and 20 violated the due process clause of the Fourteenth Amendment of United States Constitution, which prohibits a state from arbitrarily and unlawfully interfering with an individual's property rights. Plaintiffs claim that, by enforcing sections 19 and 20, the defendants have arbitrarily deprived them of their vested pension benefits in violation of the right to substantive due process guaranteed by the due process clause.

5) In addition, Plaintiffs claim three separate violations by the individual defendants (in their official capacities only) of 42 U.S.C. § 1983, which provides that any person who acts under color of law to cause the deprivation of any right, privilege, or immunity of any citizen shall be liable to the party injured by the action. Plaintiffs claim that the individual defendants acted under color of law by applying sections 19 and 20 and, by so acting: (1) Impaired the plaintiffs' contractual rights in violation of the contract clause of the United States Constitution; (2) took the Plaintiffs' private property for public use without just compensation in violation of the takings clause of the United States Constitution; and (3) deprived Plaintiffs of their property without a rational, non-arbitrary connection to a legitimate purpose in violation of the due process protections of the United States Constitution.

Plaintiffs request that the court enter a declaratory judgment finding that sections 19 and 20 violate the constitutional and statutory provisions referenced above, issue a permanent injunction barring implementation of sections 19 and 20, certify the proposed class and appoint attorneys for the class, award Plaintiffs and members of the class monetary damages to make them whole for any loss and restore them to the positions they would have been in but for sections 19 and 20, and award them their attorney fees and costs.

Status: On May 10, 2010, PERA, Mark J. Anderson, and Sara R. Alt (collectively referred to as the "PERA Defendants") filed a motion to dismiss six of the eight claims, stating that the only two claims that should remain are Plaintiffs' claims alleging violations of the contracts clause of the Colorado and United States Constitutions. The Attorney General's Office also filed a motion to dismiss on May 10, 2010, on behalf of the State and the Governor (collectively referred to as the "State Defendants").

The State Defendants joined in the PERA Defendants' arguments as to all claims raised in their motion to dismiss. In addition, the PERA Defendants joined in additional arguments regarding immunity under the Eleventh Amendment to the United States Constitution raised in the State Defendants' motion to dismiss.

On September 14, 2010, the District Court dismissed Plaintiffs' claim brought under Section 38 of Article V of the Colorado constitution and Plaintiffs' requests for monetary damages on their § 1983 claims. The Court denied the motion in all other respects.

By order dated June 29, 2011, the District Court granted the state's motion for summary judgment as to all of Plaintiffs' claims. The Court held that, while Plaintiffs unarguably have a contractual right to their PERA pension itself, they do not have a contractual right to a *specific* COLA formula in place at their respective retirement, for life without change. In so holding, the Court reviewed the history of repeated efforts made by the General Assembly, over the past 40 years, to modify the COLA formula for existing retirees. Based on numerous and steady changes in the PERA COLA formula for retirees, Plaintiffs could not have had a reasonable expectation that the COLA formula that was in place at the date of their retirement would be unchangeable for the rest of their lives.

In addition, the court also held that Plaintiffs' takings and due process claims likewise are premised on the existence of a constitutional right to an *unchangeable* COLA formula and necessarily fail because no such right exists. The 42 U.S.C. § 1983 claims also fail because the underlying constitutional claims fail.

On July 25, 2011, Plaintiffs commenced their appeal of the District Court's order granting the Defendants summary judgment on their claims by filing their Notice of Appeal with the Court of Appeals. The opening brief of the

Plaintiffs was filed December 20, 2011. The answer briefs of both the PERA Defendants and the State Defendants were filed May 16, 2012. Plaintiffs subsequently filed a reply brief. Oral arguments before the Court of Appeals took place on September 4, 2012.

In the Court of Appeals, Plaintiffs argued that the District Court applied the wrong standard and case law in deciding the case. Under this argument, the District Court relied on a 2002 Colorado Supreme Court case, In re Estate of Dewitt, regarding the test to be used for determining whether a challenged statute is constitutional under the contract clauses of the United States and Colorado constitutions.[4] The PERA Defendants relied upon this case in their arguments before the District Court. Although *DeWitt* involved the contracts clause, it did not involve public pensions. Plaintiffs further argued that the District Court did not apply (or even mention) two earlier Colorado Supreme Court cases regarding pension benefits in which the Supreme Court apparently upheld a certain level of protection for retirees' vested pension benefits.[5] In response, the PERA Defendants argued that the *Bills* and *McPhail* cases were not on point and that the District Court properly relied on *DeWitt*.

As of today's date, the Court of Appeals has not issued a ruling in this case.

Counsel of record: Plaintiffs are represented by Richard Rosenblatt of Richard Rosenblatt & Associates, LLC, and William T. Payne, Stephen M. Pincus, and John Stember of Stember Feinstein Doyle & Payne, LLC (Pittsburgh, PA). The PERA Defendants are represented by Mark Grueskin of Heizer Paul Grueskin LLP and Daniel M. Reilly, Eric Fisher, Jason M. Lynch, Lindsay A. Unruh, and Caleb Durling of Reilly Pozner LLP. The State Defendants are represented by the Attorney General's Office.

Staff member monitoring the case: Nicole Myers.

****

C. *Old Carco, LLC v. Suthers et. al*, United States District Court for the Southern District of New York, Case Number 1:2010cv08283.

---

[4] 54 P.3d 849 (2002).

[5] *Police Pension and Relief Board of Denver v. Bills,* 148 Colo. 384 (1961), and *Police Pension & Relief Bd. v. McPhail,*139 Colo. 330 (1959).

Subject: Preemption of House Bill 10-1049, involving rights of terminated motor vehicle dealers, by orders of bankruptcy court in the Chrsyler bankruptcy proceedings.

Background/Issue: In 2009, Chrysler, the motor vehicle manufacturer, declared bankruptcy. As part of the federal bankruptcy reorganization, Chrysler terminated several locally owned motor vehicle dealer franchises in Colorado. The plaintiffs allege that, on account of Chrysler being in bankruptcy when it stripped dealers of their franchises, the manufacturers did not have to comply with Colorado law concerning the termination of a dealer franchise. As a result, dealers were denied the dealer termination protections afforded by Colorado law, which require the manufacturer to reimburse the dealer for money spent in anticipation of future sales and to provide the dealer additional forms of compensation for its economic losses.

The General Assembly passed House Bill 10-1049 in response to the termination of the dealer franchise agreements without compensation. Among other things, the legislation grants motor vehicle dealers a right of first refusal if the franchise of a motor vehicle dealer has been terminated by the motor vehicle manufacturer because of the manufacturer's insolvency. This "right" would prohibit the manufacturer from granting a franchise to another dealer within five miles of the terminated dealer's franchise unless the manufacturer offered the terminated dealer a franchise agreement for a specified time. In addition, under the legislation, the dealer has an option to receive the compensation denied under Colorado law instead of the compensation specified in the franchise agreement.

In the complaint, filed in United States District Court for the Southern District of New York, Chrysler alleges that the right of first refusal conflicts with the bankruptcy court's orders allowing Chrysler to void certain franchise agreements without complying with state laws. Such state laws include those requiring compensation payments and prohibitions against termination without just cause. Under the order, the purchaser of Chrysler was authorized to purchase the assets of the bankrupt company free and clear of any obligation for the terminated franchises.

Chrysler argues that the court's orders preempt House Bill 10-1049 because the Colorado law is in conflict with the court's order. Specifically, the legislation provides for reinstatement of the terminated dealers or requires the manufacturer to make termination payments to the dealer. Chrysler also argues

that House Bill 10-1049 violates the clauses in the United States and Colorado constitutions that prohibit the impairment of existing contracts. The contract that Chrysler alleges is impaired is the sale of assets between the "old" company and the new company, which is Old Carco, LLC, that includes Fiat as a major investor. Chrysler alleges that an important consideration for the sale was the ability of the company's new buyer to purchase the assets free and clear of claims from the terminated dealers.

Chrysler seeks an order of the District Court enjoining the enforcement against it of state laws such as House Bill 10-1049. The District Court had previously held that statutes enacted by other states that are similar to House Bill 10-1049 are unconstitutional under the Supremacy Clause of the United States Constitution.

In response, the state had argued that: 1) Sovereign immunity bars Plaintiff's suit and that, because the State is being sued and in the absence of the actual application of the law, no actual case or controversy exists; 2) In the alternative, the new company, named Old Carco, is not covered by the Colorado law because it is a new entity created by the bankruptcy decree. As such, it does not meet the requirements of the statute, putting the Colorado law on a different legal footing. The issues were briefed by the parties.

Status: The District Court entered an order on March 15, 2012, in which it essentially held that the same factor that made the Colorado law constitutional -- the fact that it did not apply to Old Carco -- also made it unenforceable. Specifically, the test for applicability of the Colorado statute is whether the manufacturer terminated the dealer on the grounds of financial insolvency. Here, however, Old Carco was not insolvent precisely because it was a brand new entity. The old company that had been insolvent did not survive the bankruptcy proceedings. Thus, although the Colorado law was not found unconstitutional, this holding effectively made the Colorado statute unenforceable.

With the court's order, it appears that the portion of the litigation involving the legality of House Bill 10-1049 is at an end.

Counsel of record: Old Carco, LLC (doing business as "Chrysler") is represented by attorneys Corinne Ball, Veerle Roovers, Kevyn D. Orr, Dan T. Moss, and Jeffrey B. Ellman of Jones Day (New York, N.Y.); Gwen J. Young and Mark T. Clouatre of Wheeler, Trigg, O'Donnell, LLP, (Denver, CO), and

Robert D. Cultice with Wilmer, Cutler, Pickering, Hale, and Dorr, LLP, (Boston, MA). The state of Colorado is represented by Jim Holden of the Attorney General's Office.

Staff member monitoring the case: Jery Payne.

****

D. *Direct Marketing Ass'n v. Huber*, United States District Court for the District of Colorado, Civil Action Number 1:10-CV-01546-REB-CBS.

Subject: Legality of so-called "Amazon Bill", i.e., House Bill 10-1193, "Concerning the Collection of Sales and Use Taxes on Sales Made by Out-of-state Retailers, and Making an Appropriation Therefor."

Background/Issue: House Bill 10-1193 (the "Act"), which was part of a package of budget balancing bills developed by the Governor during the 2010 regular session of the General Assembly that eliminated, suspended, or narrowed various sales and use taxes and other tax exemptions, is designed to increase state sales and use tax revenues by generally offering an out-of-state retailer who sells goods or services to Coloradans the choice of either: (1) "voluntarily" collecting sales taxes; or (2) notifying each Colorado purchaser of the purchaser's obligation to pay use tax, annually providing a purchase summary to each Colorado purchaser, and annually providing to the Department of Revenue ("DOR") a customer information report for each Colorado purchaser that reports the total dollar amount of purchases made from the retailer. A retailer that chooses not to collect sales tax is subject to a fine for each instance in which it fails to provide the required notification, purchase summary, or annual customer information report. DOR has also promulgated rules for the purpose of implementing the Act.

On June 30, 2010, the Direct Marketing Association ("DMA"), a national trade association of over three thousand businesses and nonprofit organizations that directly market products and services to consumers via catalogs, print and broadcast media, and the internet, filed a civil action against Roxy Huber, in her capacity as the Executive Director of DOR, alleging several constitutional claims against the Act as discussed below.

Many of the DMA's members are retailers that sell products and services to

Coloradans but do not maintain any physical presence (*e.g.,* a storefront, salespeople, warehouses . . .) in Colorado. Because the United States Supreme Court has established that the Commerce Clause allows a state to impose sales tax on sales made to residents of the state by an out-of-state retailer only if the seller has substantial nexus with the state and has further established a bright-line rule that a retailer that does not maintain a physical presence within a state lacks the required substantial nexus, Colorado has been prohibited by the Commerce Clause from levying mandatory sales tax on sales made to Coloradans by such retailers. Coloradans who buy products or services from out-of-state retailers on a sales-tax exempt basis are generally legally required to pay use tax in lieu of the sales tax, but that requirement has been essentially impossible to enforce, and voluntary payment of use tax by retail purchasers is very rare.

DMA's complaint alleges that the Act violates: 1) The Interstate Commerce Clause (Art. I, Sec. 8, Cl. 3) of the United States Constitution by forcing out-of-state retailers to incur compliance costs that Colorado retailers will not incur and discouraging Colorado consumers who have privacy concerns from purchasing their products and services (on this point, DMA further alleges that the Act cannot be imposed on out-of-state retailers under the Commerce Clause because Colorado lacks sufficient minimum contacts with the retailers); 2) Colorado consumers' federal and state constitutional rights to privacy by requiring out-of-state retailers to provide annual customer information reports to DOR; 3) Both out-of-state retailers' and Colorado consumers' rights to free speech under the First and Fourteenth Amendments to the United States Constitution and Art. II, Sec. 10 of the Colorado constitution by requiring information that, in a substantial number of circumstances, will cause disclosure of the expressive content of products sold by the retailers to the consumers; and 4) Out-of-state retailers' right not to be deprived of property without due process of law and just compensation under the Fifth and Fourteenth Amendments to the United States Constitution and Art. II., Secs. 15 and 25 of the Colorado constitution by requiring the retailers to provide consumer information reports to DOR, which the DMA alleges to have a track record of not adequately protecting the security of confidential information, and thereby compromising the value of the retailers' proprietary customer lists of Colorado purchasers.

DMA seeks a declaratory judgment that the notice and reporting requirements set forth in the Act, as well as all DOR rules promulgated pursuant to those requirements, are unconstitutional, a permanent injunction enjoining

enforcement of the requirements by DOR, and costs and attorneys' fees.

Generally underlying its claims of federal and state constitutional violations, as summarized above, is DMA's belief that the primary purpose of the Act and DOR's implementing rules is not to allow DOR to enforce Colorado's use tax laws more effectively, but is instead to evade the Commerce Clause's substantial nexus requirement by essentially forcing out-of-state retailers to "voluntarily" collect sales tax by imposing discriminatory, costly, and administratively burdensome notice and reporting requirements on them if they choose not to do so.

On July 30, 2010, Ms. Huber moved to dismiss DMA's complaint on the grounds that: 1) DMA lacks standing to bring the suit; and 2) The Court lacks subject matter jurisdiction over DMA's state law claims on the grounds that: (i) The Eleventh Amendment to the United States Constitution bars DMA's challenge to the Act; (ii) Section 1983 cannot be employed to assert violations of state law; 3) DMA fails to state a claim for violation of customers' right to privacy; 4) The Complaint fails to state a First Amendment claim because it alleges no compelled speech or disclosures protected by the First Amendment; 5) DMA fails to state a claim for violation of the Fifth and Fourteenth Amendments because it has not plausibly alleged that private property is at issue or would be affected by the Act; 6) Plaintiff has failed to allege an actionable violation of the due process clause; and 7) Plaintiff's takings claim fails to state a claim for relief. On August 17, 2010, DMA responded to Huber's motion to dismiss.

On August 13, 2010, DMA moved for a preliminary injunction. Oral arguments on the preliminary injunction motion were held on January 13, 2011.

Status: By order dated January 26, 2011, the Federal District Court (Judge Robert Blackburn) granted plaintiff's motion for a preliminary injunction in part on the grounds that DMA demonstrated a substantial likelihood of success on the merits on both its discrimination claim and its undue burden claim under the so-called "dormant" Commerce Clause of the United States Constitution. The Court thereupon enjoined DOR from enforcing the Act and any regulations promulgated thereunder until further order of the Court.

On May 6, 2011, DMA and Ms. Huber filed cross-motions for summary judgment as to only the Commerce Clause issue. The Federal District Court

agreed to certify any granting of summary judgment as a final ruling for appeal purposes. The District Court would then stay its consideration of the other claims in the case pending the resolution of the Commerce Clause issue by the Tenth Circuit Court of Appeals. However, if both motions for summary judgment are denied, the case would proceed in the District Court. The parties are awaiting a ruling from the District Court on the cross-motions.

By order dated March 30, 2012, the District Court granted plaintiff's motion for summary judgment on their claims alleging violations of the federal Commerce Clause and denied defendant's motion for partial summary judgment on the same claims. The court concluded that the Act and the implementing regulations violate the Commerce Clause and, are, accordingly, unconstitutional. Specifically, the court found that the Act and the regulations directly regulate and discriminate against out-of-state retailers and interstate commerce. That discrimination triggers the virtually *per se* rule of facial invalidity. The defendant has not overcome this facial invalidity by showing that the Act and regulations serve legitimate state purposes that cannot be served adequately by reasonable nondiscriminatory alternatives. The court also found that the Act and the regulations impose an undue burden on interstate commerce under the standards established in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) . The court further entered an order permanently enjoining and restraining DOR from enforcing the specific provisions of the Act and regulations that are unconstitutional.

On June 25, 2012, defendant (as appellant) filed an opening brief in the United State Court of Appeals for the Tenth Circuit appealing, on an interlocutory basis, the District Court's order on the motion to dismiss the Commerce Clause claims. DMA's answer brief was filed on July 30, 2012. Defendant's reply brief was filed on August 16, 2012. Oral argument on the appeal is scheduled for November 7, 2012.

Counsel of record: DMA is represented by Greg Isaacson and Matthew Schaefer of Brann & Isaacson (Boston, MA). Ms. Huber is represented by Karen McGovern, Robert Dodd, Jr., and Stephanie Lindquist Scoville of the Attorney General's Office.

Staff members monitoring the case: Esther Van Mourik.

****

E. ***Colorado Off-highway Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, Denver District Court, Case Number 10-CV-6500.**

Subject: Rulemaking procedures affecting the use of moneys in the Off-highway Vehicle Recreation Fund and allegations of violations of state Open Meetings Law.

Background/Issue: The Colorado Off-highway Vehicle Coalition (the "Coalition") filed suit on August 13, 2010, regarding certain actions of the Board of Parks and Outdoor Recreation ("Board") relating to the Off-highway Vehicle Recreation Fund (the "Fund") created in section 33-14.5-106, C.R.S., and allegations that the Board violated the Open Meetings Law ("OML"), part 4 of article 6 of title 24, C.R.S.

The Fund consists of off-highway vehicle registration fees and off-highway vehicle use permits, and is to be used:

> . . . for the administration of this article, for information and awareness on the availability of off-highway vehicle recreational opportunities, for the promotion of off-highway vehicle safety, for the establishment and maintenance of off-highway vehicle routes, parking areas, and facilities, and for the purchase or lease of private land for the purposes of access to public land for uses consistent with the provisions of this article; however, any moneys collected in excess of four dollars per original or renewal registration shall be used exclusively for direct services and not administrative costs. Section 33-14.5-106 (1), C.R.S.

Section 33-14.5-101, C.R.S., defines "off-highway vehicle route" as "any road, trail, or way owned or managed by the state or any agency or political subdivision thereof or the United States for off-highway vehicle travel".

The Board has established a grant program that uses moneys in the Fund or projects related to the recreational use of off-highway vehicles on lands open to the public. The criteria for awarding grants are not established by rule but rather by policy. Several members of the Board held three meetings with third parties to discuss changes to the grant award criteria policy. The Executive Director of the Coalition was excluded from these meetings but two other members of the Coalition did attend the meetings. The Board later adopted

changes to the policy that were allegedly discussed or approved at the three meetings, including the use of the Fund for activities that are allegedly not covered by article 14.5 of title 33, C.R.S., such as for routes that are not "off-highway vehicle routes" and for general enforcement of off-highway vehicle laws in state parks.

The complaint's first three causes of action allege violations of the OML and, specifically, section 24-6-402, C.R.S., with regard to the three meetings. The fourth claim alleges that the changes to the policy amounted to a rule and were adopted in violation of the Colorado Administrative Procedures Act, section 24-4-106. The fifth claim is for declaratory judgment and costs.

Status: In its answer, the Board admits that the three meetings violated the OML, but denies that the Board's actions at the meetings constitute rulemaking or final agency action. In its answer, the Board also denied that Plaintiff is entitled to any form of relief.

On July 13, 2011, the District Court resolved Plaintiff's summary judgment motion by holding that the board's approval of the changes to the use of the Fund: 1) cured the previously admitted violation of the OML; and 2) was within the Board's statutory authority. In so holding, the District Court concluded that the board's actions were taken at a properly noticed open meeting at which it did not simply "rubber-stamp" the prior approvals but rather engaged in a full discussion of the issues. The District Court also denied the Plaintiff's request for fees and costs.

Plaintiff filed a notice of appeal on October 3, 2011 (Case No. 11CA1988). The Notice of Appeal lists the following issues: 1) Whether the Board could and did cure its OML violations; 2) Whether the District Court's denial of costs and fees to the Plaintiff was in error; and 3) Whether the Board has statutory authority to award grants for off-highway vehicle route closures. Oral arguments before the Court of Appeals were held on July 24, 2012.

On August 30, 2012, the Court of Appeals affirmed the trial court's order.[6] The Court of Appeals found that, because the purpose of the OML is to require open decision-making and not to permanently condemn a decision made in violation of the statute, a public body may cure a previous violation of the

[6] *See Colorado Off-Highway Vehicle Coalition v. Colo. Bd. of Parks and Outdoor Recreation*, 2012 COA 146 (2012).

OML by holding a subsequent complying meeting that is not a mere rubber stamping of an earlier decision. Further, because the Board cured the violation before the filing of the complaint, the coalition was not a prevailing party and is not entitled to an award of fees and costs. The Court of Appeals did not address the Board's authority to award the grants.

Counsel of record: The Coalition is represented by Jim Witwer of Trout, Raley, Montano, Witwer, & Freeman. The Board is represented by Tim Monahan of the Attorney General's Office.

Staff member monitoring the case: Tom Morris.

****

F. *American Tradition Institute vs. State of Colorado*, United States District Court for the District of Colorado, Civil Action Number 1:11-cv-00859-WJM-KLM.

Subject: Constitutionality of state's renewable energy standard mandate.

Background/Issue: Colorado voters statewide passed a measure in 2004 that called for 10% of the electricity sold by the state's utilities (mainly Xcel Energy) to come from renewable energy sources by 2015. This measure was known as Amendment 37. The General Assembly has raised the target, otherwise known as the Renewable Energy Standard ("RES") mandate, twice since then, most recently raising the RES to its current goal of 30% by 2020.

On April 4, 2011, two nonprofit organizations, the American Tradition Institute and the American Tradition Partnership, and a private citizen who resides in Morrison, Colorado, named Rod Lueck (collectively referred to as "Plaintiffs") sued the state and several officials over the constitutionality of the state's RES mandate. The individuals sued include Governor Hickenlooper, Barbara Kelley, as Executive Director of the Colorado Department of Regulatory Agencies, and the Executive Director and the three sitting commissioners of the Public Utilities Commission (collectively referred to as "Defendants").

The complaint alleges that the RES discriminates on its face against legal, safer, less costly, less polluting, and more reliable in-state and out-of-state generators of electricity sold in interstate commerce. Specifically, because the

RES provides economic benefits to Colorado's renewable economic generators that are not available to out-of-state power generators, and because the state imposes burdens on interstate electricity generators that are not balanced by the benefits to Colorado and its citizens, the RES violates the Commerce Clause of the United State Constitution, which reserves the regulation of interstate commerce to the federal government. The argument is that the Commerce Clause does not permit a state to impose burdens on the interstate market for electricity. The complaint also alleges that the RES promotes renewable sources and discriminates against lower cost, more reliable energy generation from out-of-state suppliers, which it also alleges is unconstitutional.

Among other things, Plaintiffs seek declaratory and injunctive relief requesting: 1) A judicial declaration that the statutory provisions and implementing regulations codifying the RES mandate are unconstitutional, invalid, and unenforceable; and 2) An order prohibiting the Defendants from implementing said provisions and regulations, including the standard rebate offer and the tradable energy credits program, to the extent that such legal requirements satisfy certain conditions specified in the complaint. The complaint also requests damages in an unspecified amount.

Status: On Tuesday, July 12, 2011, the state filed its answer to the complaint and a motion to dismiss the same. Several environmental groups moved to intervene as defendants; those motions were granted on February 21, 2012. On July 17, 2012, the court dismissed all claims against the state of Colorado, Governor Hickenlooper, and Barbara Kelley, and further dismissed claims for damages against the members of the Public Utilities Commission.

Additional motions to intervene as defendants were filed in August, 2012, by Interwest Energy Alliance and the Solar Energy Industries Association; those motions are still pending before the court. The scheduling conference set for August 29, 2012, was vacated on September 4, 2012, and the parties have been directed to file a status report by January 21, 2013.

Discovery is proceeding on the issue of the legal standing of Plaintiff Rod Lueck; a motion for protective order relating to this issue was filed on September 19, 2012. That motion is still pending. A trial date has not been set.

Counsel of record: Plaintiffs are represented by Kent Holsinger, Laura Chartrand, and Jack Silver of the Holsinger Law Firm, LLC.

Staff member monitoring the case: Duane Gall.

****

G. *Kerr, et al., v. Hickenlooper*, United States District Court for the District of Colorado, Civil Action Number 1:11-cv-01350-WJM.

Subject: Whether the TABOR amendment to the Colorado constitution violates, among other provisions, section 4 of article IV of the United States Constitution, under which the United States guarantees to every state a republican form of government ("Guarantee Clause").

Background/Issue: On or about May 23, 2011, State Representative Andy Kerr and 34 other named Plaintiffs, including four other current members of the General Assembly,[7] commenced a lawsuit against the state of Colorado in United States District Court for the District of Colorado alleging that TABOR, section 20 of article X of the Colorado constitution, violates the Guarantee Clause, other provisions of the federal constitution, and specified federal statutory provisions. On or about June 15, 2011, Plaintiffs filed an amended complaint naming Governor Hickenlooper the sole defendant (in his official capacity).

Specifically, the Plaintiffs' claims allege that:

1) By removing the taxing power of the General Assembly, TABOR renders the General Assembly unable to fulfill its legislative obligations under a republican form of government and violates the Guarantee Clause.

2) TABOR has made the General Assembly ineffective by removing an essential function, namely the power to tax. As such, TABOR violates the federal Enabling Act of 1875 ("Enabling Act"), which set forth the requirements for Colorado statehood, including the requirement that the state have a republican form of government.

3) Because TABOR represents an irresolvable conflict with the Guarantee Clause and the Enabling Act, under the Supremacy Clause of the United States Constitution (section 2 of article VI), TABOR must yield to the Guarantee Clause and the Enabling Act.

---

[7] Senator Morse and Representatives Court, Hullinghorst, and Levy.

4) These violations of the requirement for a republican form of government deny to Plaintiffs and others the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

5) In depriving the General Assembly of the power to tax, TABOR nullifies the inherent and necessary powers of the General Assembly under section 2 of article X[8] and sections 31 and 32 of article V of the Colorado constitution[9] and, consequently, violates both those "superior" provisions of the Colorado constitution and the Guarantee Clause. As part of this claim, Plaintiffs allege that any amendment to the Colorado constitution must be read as subordinate to the "superior" obligation of the state to maintain a republican form of government. "The citizens of the [state] were and are constitutionally disempowered to amend the state constitution to derogate or remove power and authority from the legislative branch such that the nature of the state's Republican Form of Government is compromised or undermined." This claim will be referred to below as the "Impermissible Amendment" claim.

For their requested relief, Plaintiffs seek declarations that TABOR is unconstitutional facially and as-applied, that it is null and void, that Plaintiffs' rights to and responsibilities under the Guarantee Clause have been violated, and that TABOR violates the Territorial and Enabling Acts.[10] Plaintiffs also seek an order prohibiting any state officer from taking any action to effect the requirements and purposes of TABOR.

Status: On or about August 15, 2011, Defendant Governor Hickenlooper moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. In his pleading, Governor Hickenlooper alleges that Plaintiffs' claims constitute nonjusticiable political questions that neither the federal court nor any other court can resolve and further, even if such questions could be resolved by the federal court, Plaintiffs lack standing to raise them. The Governor's motion is still pending before the Court.

---

[8] Section 2 of article X of the Colorado constitution requires the General Assembly to provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of state government for each fiscal year.

[9] Sections 31 and 32 of article 5 address requirements relating to revenue raising and appropriations bills, respectively.

[10] The Territorial Act is a federal statute, enacted in 1861, that provided for the organization of a temporary government for what was then the territory of Colorado.

In October 2011, Plaintiffs were given leave to file a first amended substitute complaint. A hearing on various motions was held before a magistrate judge on November 15, 2011.

Oral arguments on a motion to dismiss filed by the Defendant that Plaintiffs lack legal standing to pursue the action and related pleadings supporting Plaintiffs' position were held on February 15, 2012. Ultimately the Court concluded that further briefing on the standing issue could assist the Court in arriving at the correct resolution of the standing question presented. The Court ordered the parties (and invited amici) to prepare supplemental briefs on the issue of Plaintiffs' standing and further ordered the parties to focus on 5 specified issues. The parties were ordered to submit their supplemental briefs on or before March 16, 2012.

After consideration of the parties' supplemental briefs, the Court granted the Defendant's motion to dismiss in part and denied the same in part. Specifically, the Court held that, on the basis of the pleadings, Plaintiffs who are members of the Colorado General Assembly have advanced sufficient allegations of a cognizable injury in fact sufficient to confer constitutional standing to bring the action. Nor do prudential standing principles bar these Plaintiffs at this stage of the proceedings. Accordingly, the action is not subject to dismissal for lack of standing. The Court also held that it would not be appropriate to dismiss Plaintiffs' Guarantee Clause claim at this stage as non-justiciable under the political question doctrine. Similarly, Plaintiffs' Enabling Act claim is also justiciable and not barred by the political question doctrine. The Court held Plaintiffs failed to state a claim under the Equal Protection Clause and dismissed that claim with prejudice. The Court further held that the political question doctrine does not bar Plaintiffs' Impermissible Amendment claim. Therefore, the Court allowed the action to proceed past the pleadings stage on all of Plaintiffs' claims except for the Equal Protection claim.

The Defendants subsequently sought an interlocutory appeal of the District Court's order on the motion to dismiss with the Tenth Circuit Court of Appeals. The Tenth Circuit granted this request for an interlocutory appeal on September 24, 2012. The District Court has stayed the litigation pending consideration of the interlocutory appeal.

Counsel of record: Plaintiffs are represented by Herbert Fenster, Lino Lipinsky de Orlov, and David Skaggs of McKenna Long & Aldridge LLP, and Michael Feeley, John Herrick, and Emily Droll of Brownstein Hyatt Farber

Schreck LLP. The state and Governor Hickenlooper are represented by the Attorney General's Office.

Staff members monitoring the case: Sharon Eubanks and Bob Lackner.

****

H. *Patient Caregiver Rights Litigation Project, et. al. vs. General Assembly, et. al.*, Denver District Court, Case Number 2011-CV-4632.

Subject: Constitutionality of all or part of three pieces of legislation, House Bill 10-1284, Senate Bill 10-109, and House Bill 11-1043 (collectively referred to as "Medical Marijuana Legislation") under the medical marijuana provisions of the Colorado constitution, section 14 of article XVIII.

Background/Issue: On or about June 30, 2011, a group of plaintiffs, including the Patient Caregiver Rights Litigation Project, the Colorado Patients' Alliance, the Rocky Mountain Caregivers Cooperative, and two named individuals, filed a lawsuit in Denver District Court alleging that all or part of the Medical Marijuana Legislation is unconstitutional under the medical marijuana provisions of the Colorado constitution enacted by the voters in 2000. Plaintiffs' original complaint named the General Assembly as one of the defendants. Plaintiffs filed an amended complaint on or about July 29, 2011, naming as defendants, besides the state, Governor Hickenlooper and Barbara Brohl and Martha Rudolph, executive directors of the Departments of Revenue and Public Health and Environment, respectively. Unlike their original complaint, the amended complaint did not name the General Assembly as a defendant.

Among other claims, the complaint alleges that section 14 of article XVIII of the Colorado constitution guarantees patients diagnosed by physicians as having a debilitating medical condition, and their primary caregivers, a constitutional right to engage in the use of marijuana for medical purposes. Plaintiffs allege that the medical marijuana provisions of the Colorado constitution secure individual constitutional rights available to all citizens and residents statewide.

Plaintiffs further allege that: 1) The Medical Marijuana Legislation and regulations interfere with the constitutionally secured rights of qualifying

patients and their primary caregivers to the medication; 2) By empowering local authorities to prohibit marijuana businesses, the legislation represents a further restraint on access to medication; 3) The legislation conflicts with confidentiality, privacy, and property protection provisions of the Colorado constitution; and 4) The legislation inflicts severe harm upon qualifying medical marijuana patients by effectively depriving them of ready access to medication envisioned by the Colorado constitution for such patients.

The complaint further alleges that no compelling state interest or rational basis exists for infringement of the constitutionally secured right of access of hundreds of thousands of qualifying patients to their medication.

Plaintiffs seek a declaration that certain statutory provisions and regulations promulgated thereunder be declared unconstitutional as they pertain to qualifying medical marijuana patients and to their caregivers. Plaintiffs additionally request an order from the Court barring Defendants preliminarily or permanently from implementing or enforcing the Medical Marijuana Legislation and regulations.

Status: On or about September 2, 2011, Defendants answered Plaintiffs' amended complaint. On November 2, 2011, the District Court granted a motion to stay the case. The stay was granted to await a determination by the Colorado Supreme Court to grant certiorari in the case of *Beinor v. Industrial Claims Appeals Office*, since the parties have agreed that many of the issues in this case could be resolved by a ruling of the Supreme Court in *Beinor*. Subsequently, the Supreme Court denied certiorari in *Beinor* and the District Court lifted the stay on July 31, 2012. It does not appear that any substantive rulings have been entered since that time.

Counsel of record: Plaintiffs are represented by Andrew Reid of Springer and Steinberg, PC. Defendants are being represented by the Attorney General's Office.

Staff members monitoring the case: Michael Dohr.

****

I. *Walker Stapleton v. PERA*, Denver District Court, Case No. 11-CV-6530.

Subject: The circumstances under which the Public Employees Retirement Association ("PERA") is required to provide certain member and benefit recipient information to State Treasurer Walker Stapleton ("Treasurer").

Background/Issue: By letter dated June 3, 2011, the Treasurer, a statutory member of the board of trustees of PERA, requested information from PERA that would reveal how much money PERA pays the top 20% of its beneficiaries based on annual pension benefits and how these members earned such benefits. Specifically, the Treasurer sought information concerning the annual retirement benefits, year of retirement, last 5 years of salary as a PERA contributor, employer division, and ZIP code of residency for these beneficiaries. The Treasurer repeated his request in subsequent correspondence dated July 11, 2011. The Treasurer is not seeking the identities of individual retirees.

Through correspondence sent in August 2011, legal counsel for the Treasurer (the Attorney General's Office) stated that "immediate review of the information is necessary to allow him and other [trustees] to make informed and timely decisions about investments, disbursements, and potential changes in benefits, among other matters."

In response, PERA' s board of trustees retained private legal counsel by the name of John A. Nixon from the Philadelphia, Pennsylvania, law firm of Duane Morris to advise the board on how to respond to the Treasurer's request. On the basis of a legal opinion from Nixon dated August 25, 2011, the board rejected the request. The legal opinion stated that:

> Based on all the pertinent facts and the law, it is our legal opinion that Treasurer Stapleton's request for information is not consistent with an appropriate fiduciary function (i.e., verifying benefit calculation). Moreover, given the nature of the request, the disclosed information could result in a violation of the confidentiality protections afforded under PERA law and Colorado law more generally. Lastly, the information cannot be acquired by Treasurer Stapleton in his capacity as a fiduciary and converted to his objectives as State Treasurer. Such conversion could be deemed adverse to PERA members and a violation of the duty of loyalty. In light of these determinations, it is our opinion that the disclosure of member information to Treasurer Stapleton in the form requested would likely result in

a breach of his fiduciary duty to the members of PERA.

After consideration of the Nixon legal opinion, on August 31, 2011, all trustees except for the Treasurer voted to deny his request.

Through legal counsel, on September 8, 2011, the Treasurer submitted a written response to the Nixon legal opinion.

Subsequent correspondence among the Attorney General's Office, PERA's board, and Nixon, including an additional letter from Nixon addressing the Treasurer's response in which Nixon confirmed his earlier conclusions, failed to resolve the dispute.

On or about September 19, 2011, the Treasurer filed suit in Denver District Court against PERA and the other members of the board of trustees ("PERA Defendants"). In his complaint, the Treasurer seeks: 1) A declaration that the PERA Defendants breached their fiduciary duty by denying him access to the records requested; 2) A legal declaration that Governance Manual Tab 17(14) is inconsistent with the fiduciary duties of the PERA Defendants to the extent it is used to deny access to the disputed records;[11] 3) A writ of mandamus allowing the Treasurer to examine all records requested; 4) Issuance of a mandatory injunction allowing the Treasurer to examine all records requested; and 5) A legal declaration that the PERA Defendants timely present records in a format that will allow the Treasurer reasonable access to such records.

Status: On or about October 13, 2011, the PERA Defendants filed their Answer, Affirmative Defenses, and Counterclaims to the Treasurer's Complaint. In their pleading, the PERA Defendants request a judgment declaring, among other things, that: 1) It is lawful for PERA to provide member and benefit recipient information to a trustee only when the trustee has demonstrated that: (i) the trustee seeks the information so he or she can perform a valid, identified fiduciary function; (ii) there is a reasonable nexus between the information requested and the valid, identified fiduciary function, including that the information will in fact assist the trustee in performing such fiduciary function; (iii) the expenses associated with providing the requested

[11] Tab 17 (14) of the Governance Manual promulgated by PERA states in relevant part: "Trustees shall only make reasonable requests for information that are necessary for purpose of fulfilling their duties as Trustees, and shall not request or use PERA information for their own personal or business use."

information are reasonable under the circumstances then prevailing; and (iv) safeguards can be imposed on the production of the information to preserve the confidentiality of member and benefit recipient information, which may include conditions on the circumstances under which the trustee may review the information; 2) Tab 17(14) of the Governance Manual is a valid and enforceable policy of PERA; and 3) The Treasurer is not entitled to the information sought because he has not satisfied the above conditions.

The parties filed cross motions for determination of matters of law under C.R.C.P. 56 (h). After oral argument on the motions, in an order dated April 3, 2012, the District Court found that PERA's funds are not public moneys and are not entrusted to the Treasurer's care. The Treasurer's duties with respect to these PERA funds are no greater and no different from the duties of any other member of PERA's board of trustees. These duties do not extend to the public at large and flow solely to members and benefit recipients of PERA. The court rejected the Treasurer's argument that he has a responsibility to ensure that PERA's current and future liabilities are actuarially compatible with the fund's assets, finding instead that this is the responsibility of the General Assembly.

The District Court further found that details of specific and individual benefits paid to a defined class of members are confidential pursuant to section 24-51-213 (1), Colorado Revised Statutes. A PERA trustee cannot maintain the fiduciary obligation imposed by statute unless the trustee also maintains the confidentiality of individual member information mandated by statute. The treasurer did not explain how the relevant information was reasonably designed to further "solely" the interests of PERA members and benefit recipients. Tab 17 (14) of the Governance Manual was found to be valid and enforceable and consistent with the trustees' fiduciary duties. Accordingly, the Court concluded that the Treasurer was not entitled to the requested information and the PERA board acted appropriately in denying the Treasurer's request for information, The court additionally declined a request from PERA to declare standards to guide the board when considering future requests for confidential information.

The Treasurer has filed an appeal with the Colorado Court of Appeals. The Treasurer's opening brief is due in October 2012.

Counsel of record: The Treasurer is represented by the Attorney General's Office. The PERA Defendants are represented by John McDermott, Amy Benson, and Karl Schock of the law firm of Brownstein Hyatt Farber Schreck,

LLP.

Staff members monitoring the case: Gregg Fraser.

****

J. Regents of the University of Colorado v. Students for Concealed Carry on Campus, Colorado Supreme Court, Case Number 10SC344.

Subject: Authority of the University of Colorado Board of Regents ("Board') to adopt a weapons control policy that prohibits a person -- including a person who possesses a valid concealed handgun permit -- from possessing a firearm on the university campus.

Background/Issue: Students for Concealed Carry on Campus, LLC, (students) filed suit against the Board, alleging that the Board's weapons policy, which prohibited carrying firearms on campus, violated the Colorado Concealed Carry Act (CCA), §§ 18-12-201 et seq., and the Colorado constitution's right to bear arms. In response, the Board filed a motion to dismiss, which the trial court granted.

On April 15, 2010, the Court of Appeals reversed the trial court's decision. On review, the appellate court held that the CCA's comprehensive statewide purposes, broad language, and narrow exclusions demonstrated that the General Assembly had divested the Board of the authority to regulate concealed handgun possession on the university campus. The Court noted that the CCA allows a concealed handgun permit holder to carry a concealed handgun "in all areas of the state", with certain specific exceptions. The exceptions include public elementary, middle, junior high, and high schools, but they do not include universities.

Because the Board lacked authority to regulate handgun possession and because the university policy purported to do so, the Court of Appeals concluded that the students had stated a valid claim upon which relief could be granted.

On March 5, 2012, the Colorado Supreme Court affirmed the judgment of the

Court of Appeals. Because the Supreme Court affirmed the prior decision on statutory grounds, it did not consider the students' constitutional claim.

Status: Since the decision of the Supreme Court, the University of Colorado Boulder and the University of Colorado at Colorado Springs have announced that they are amending their student housing contracts to prohibit the possession of firearms in dormitories. Both campuses will establish a residential area for students over the age of 21 who possess a permit. In all other dormitories, firearms will be banned.[12]

Counsel of record: Patrick T. O'Rourke and Margaret Wilensky of the Office of University Counsel represented the University and the Board. James M. Manley of the Mountain States Legal Foundation represented the Students for Concealed Carry on Campus.

Staff member monitoring this case: Richard Sweetman.

****

K. Colorado Common Cause and Colorado Ethics Watch v. Gessler, Denver District Court, 11-CV-4164.

Subject: Judicial review of Rule 4.27, an administrative rule promulgated by the Colorado Secretary of State concerning disclosure of contributions and expenditures by issue committees.

Background/Issue: In November 2010, the United States Court of Appeals for the Tenth Circuit decided the case of *Sampson v. Buescher*, 625 F.2d 1247 (10th Cir. 2010), which involved a constitutional challenge to Colorado's reporting requirements for issue committees.[13] Subjecting Colorado law on issue committee disclosure to exacting scrutiny, the Tenth Circuit held that the governing law unconstitutionally burdened the *Sampson* Plaintiffs' First

[12] *See* http://www.denverpost.com/news/ci_21332647/cu-segregate-dorms-students-concealed-carry-permits?IADID=Search-www.denverpost.com-www.denverpost.com.

[13] Those requirements, codified in section 2 (10) (a) of Article XXVIII of the Colorado constitution, in relevant part obligate disclosure of persons accepting or making contributions or expenditures in excess of $200 to support or oppose any ballot issue or ballot question.

Amendment rights of free association. The Court further stated that it would not draw a bright-line beyond which a ballot issue committee cannot be required to report contributions and expenditures. The Court would only conclude that the *Sampson* Plaintiffs' contributions and expenditures in the instant case were well below any such line.

In response to the *Sampson* decision, Secretary of State Gessler ("Secretary") promulgated Rule 4.27, which increased the dollar amount of the threshold reporting requirement by issue committees for contributions and expenditures from $200 to $5,000.[14] Rule 4.27 was promulgated to resolve uncertainty about registration and disclosure requirements affecting issue committees in light of the ruling of the Tenth Circuit in *Sampson*.

Shortly following promulgation of the rule, Colorado Common Cause and Colorado Ethics Watch (collectively "Plaintiffs") brought an action under section 24-6-106, C.R.S., in Denver District Court seeking judicial review of agency action with respect to Rule 4.27. Plaintiffs alleged that the promulgation of the rule exceeded the Secretary's authority and was inconsistent with Article XXVIII and the disclosure provisions of the Fair Campaign Practices Act ("FCPA"). Plaintiffs asked the Court to set aside Rule 4.27.

By order dated November 17, 2011, the District Court set aside Rule 4.27 as an unauthorized exercise of the Secretary's power. Specifically, the Court found that Rule 4.27 adds to, modifies, and conflicts with the constitutional provision it claims to administer. In fact, the Court found that the rule not only conflicts with, but also abrogates, existing constitutional and statutory requirements. Because the Secretary is not empowered to promulgate rules that add to, modify, or conflict with constitutional provisions, the promulgation and adoption of Rule 4.27 exceeded his authority.

A major factor supporting the District Court's order is that *Sampson* was an as-applied challenge, i.e, the Tenth Circuit found that the registration requirements of Article XXVIII requiring issue committees to register after raising or spending $200 was invalid *as applied* to them. Accordingly, the trial

---

[14] Rulemaking with respect to this particular matter had commenced under Secretary Gessler's predecessor in office, Secretary Buescher.

court found that the holding in *Sampson* does not invalidate either Article XXVIII or the FCPA except in like situations. Thus, even without Rule 4.27, Colorado's reporting and disclosure standards for issue committees presumptively remain applicable, other than in contexts similar to that present in *Sampson*. The District Court found that the Secretary could not do what the Tenth Circuit declined to do, i.e., draw a bright line, while ignoring the severability clause of Article XXVIII.[15] Otherwise, he has broadly invalidated a provision of the Article without giving consideration to its "other applications" as required by Section 14 of the Article.

The Secretary appealed the District Court's order to the Colorado Court of Appeals. On August 30, 2012, the Court of Appeals issued an order affirming the ruling of the trial court that the Secretary exceeded his rulemaking authority by promulgating Rule 4.27.[16] The Court of Appeals concluded that *Sampson* did not facially invalidate any provision of Colorado campaign finance law and, to the extent *Sampson* impacts future application of such laws on issue committees in similar factual contexts, Rule 4.27 exceeds the scope of *Sampson*. The Court of Appeals rejected the Secretary's argument that *Sampson* created a gap in the law, triggering his obligation to promulgate a rule. Instead, the Court of Appeals concluded that *Sampson* declined to address the facial challenge to Colorado law and only held that the application of the these laws to plaintiffs in that case unconstitutionally burdened their freedom of association. As such, *Sampson* provides persuasive authority with regard to future applications of the campaign laws in other contexts but does not render these laws completely inoperative.

The Court of Appeals found that the limitations required by Rule 4.27 are not established by *Sampson*. Indeed, *Sampson* implicitly acknowledged that Colorado disclosure requirements may be constitutionally applied outside the context presented to it. Consequently, Rule 4.27 effectively modified and

---

[15] That clause, contained in section 14 of Article XXVIII, states that "[i]f any provision of this article or the applications thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provision or application". Arguably, this section specifically addresses the effect of an as-applied challenge.

[16] *See Colorado Common Cause and Colorado Ethics Watch v. Gessler*, 2012 COA 147 (2012).

contravened Colorado campaign finance law by eliminating certain requirements of Article XXVIII and the FCPA. Because Rule 4.27 invalidates the disclosure requirements on issue committees far beyond the reach of *Sampson*, the Secretary exceeded his authority and the Rule must be set aside as void.

Status: The Secretary will be filing a petition for writ of certiorari with the Colorado Supreme Court seeking reversal of the decision of the Court of Appeals. A petition for writ of certiorari must be filed with the Colorado Supreme Court no later than October 11, 2012.

Counsel of record: Jennifer Hunt and Nathan Flynn of the law firm of Hill & Robbins, PC, are representing Colorado Common Cause. Luis Toro and Margaret Perl are representing Colorado Ethics Watch. Attorney General John Suthers and Deputy Attorney General Maurice Knaizer are representing the Secretary.

Staff member monitoring this case: Bob Lackner.

****

L. Gessler v. Johnson, Denver District Court, Case No. 11-CV-6588.

Subject: Whether election officials are permitted to send ballots in mail ballot elections to electors deemed inactive by reason of the elector's failure to vote in a prior election.

Background/Issue: Pursuant to the "Mail Ballot Election Act", article 7.5 of title 1, Colorado Revised Statutes, the governing board of a political subdivision in Colorado has the option of conducting an election by mail ballot. Such elections are limited to those involving only nonpartisan candidates or ballot issues or ballot questions. In these elections, there are no traditional polling places for most electors casting a ballot; instead, electors generally vote by mailing in ballots sent to them by the clerk and recorder ("Clerk") of their home county. For mail ballot elections, section 1-7.5-107 (3) (a) (I),Colorado Revised Statutes, directs designated election officials to mail a mail ballot packet "to each active registered elector".

Under Colorado law, an elector's voter registration record is marked "Inactive - Failed to Vote" ("IFTV") after he or she does not vote in one general election. *See* Section 1-2-605 (2), Colorado Revised Statutes. Although an inactive elector remains registered (and able) to vote, the practical consequence of being deemed inactive is that the elector will not receive a mail ballot, even if he or she previously opted to become a permanent mail-in voter. An inactive elector is apprised through correspondence from the Clerk of this change in voter status, and may use one of several methods to reactivate his or her voter registration status (i.e., by updating his or her voter registration record with, or returning a confirmation card to, the Clerk, by applying for a mail-in ballot, or by voting in an election).

Thus, electors who had not voted in the 2010 general election, and who had also failed to respond to postcards from their Clerk asking them whether they wanted a ballot for the statewide November 1, 2011, ballot issue election would not be sent a mail ballot unless they complied with these additional processes to reactivate their status.

In connection with the statewide ballot issue election set for November 2011, Denver County ("Denver") had planned to mail ballots to all registered electors in the county as it had done in all 5 of its previous mail ballot elections. Prior secretaries of state had approved mail ballot plans in which various Clerks had sent mail ballots to IFTV electors. However, when Denver announced its intention to send ballots for this statewide ballot issue election to registered electors, active and inactive alike, the Secretary issued an order to Denver ordering the county to desist from sending mail ballots to registered electors who are inactive for failure to vote.

Subsequently, on September 20, 2011, the Secretary filed suit in Denver District Court seeking declarative and injunctive relief. Specifically, the Secretary sought: 1) A declaration that Debra Johnson, Denver's Clerk, possesses no authority to defy the Plaintiff's order and that the Secretary's orders on statewide ballot issue elections must be applied uniformly, and 2) An order enjoining Denver from mailing ballots to anyone other than active registered electors.

In his complaint, the Secretary based his position on the language of section 1-7.5-107 (3) (a) (I), Colorado Revised Statutes, which states that Clerks "shall

mail to each active registered elector...a mail ballot packet...." For the Secretary, the adjective "active" is crucial. If the General Assembly had intended to allow election officials to send packets to all registered electors, it would not have used the word "active".

Moreover, under relevant statutory authority, mail ballots were ordered to be delivered to all IFTV electors for the November 2009 mail ballot election, but this authority was repealed, effective July 1, 2011.[17] Accordingly, under existing legal authority, Clerks may send ballots only to active registered electors. They have neither the authority nor the discretion to send mail ballots to inactive electors who failed to vote. Denver's proposal to send ballots to inactive-failed to vote electors directly contravenes the statute.

In his complaint, the Secretary claimed support for his interpretation of the Mail Ballot Election Act from both Colorado's stated goal of uniform implementation of elections laws and his supervisory role in statewide ballot issue elections. As applied to the facts of the case, the Secretary argued that he brought his action to preserve statewide uniformity for the upcoming November 1, 2011, coordinated election in which a statewide ballot measure was on the ballot.

The Secretary emphasizes that IFTV electors would still be able to cast a ballot at vote centers or election service centers. However, they would not be sent a mail ballot packet.

In response, Defendant Johnson asserted that the statutory language at issue does not prohibit her from mailing mail ballots to inactive electors. To the contrary, the relevant statute establishes a *minimum* standard with which elections officials are required to comply. In accordance with the the policy goals underlying the Uniform Election Code of promoting and facilitating voting, Clerks should not be estopped from sending mail ballots to IFTV electors.

---

[17] Enacted to reduce the number of persons marked with the IFTV designation arising from electoral irregularities in the 2006 general election, House Bill 08-1329 required mail ballots to be sent to IFTV electors for mail ballot elections in November 2009. *See* section 1-7.5-108.5 (2) (b), Colorado Revised Statutes. However, as noted *infra*, this mandate repealed automatically on July 1, 2011.

On October 7, 2011, Denver District Court Judge Brian Whitney denied the Secretary's motion for a preliminary injunction, and Denver was permitted to send ballots to IFTV electors. The District Court held that, while there was a reasonable probability the Secretary could succeed on the merits on his underlying legal claims, there were other factors to be considered in issuing a preliminary injunction. Because some ballots had already gone out to inactive electors -- and had been returned -- if Denver were told to stop sending ballots to IFTV electors, there would be some voters who would have cast ballots that would not be counted. Because Denver had followed this policy for five mail ballot elections, the Court did not see how it could create irreparable injury for Denver to follow this practice one more time. The Court further stated that it is a fundamental right to be able to vote, and it would constitute irreparable injury to disenfranchise a voter. The Court finally agreed with Denver that state law does not explicitly prohibit mail ballots from being mailed to IFTV electors.

After the ruling of the District Court, Denver and Pueblo County proceeded with their plans to send mail ballots to inactive voters.

On November 16, 2011, Judge Whitney granted intervenor status to Colorado Common Cause.

Status: The lawsuit on the underlying claims is pending in Denver District Court and trial is set for January 2013.

In a separate action filed September 19, 2012, Clerk Johnson filed a new action against the Secretary challenging a rule promulgated by him that prohibits election officials from sending mail ballots to inactive voters in nonpartisan and coordinated elections conducted as mail ballot elections.

Counsel of record: The Secretary of State is represented by Attorney General John Suthers and Deputy Attorney General Maurice Knaizer. Denver is represented by Douglas Friednash, Victoria Ortega, and David Cooke of the Denver City Attorney's office. Colorado Common Cause is represented by J. Lee Gray of Holland & Hart.

Staff members monitoring the case: Bob Lackner and Kate Meyer.

****

M. Colorado Ethics Watch and Colorado Common Cause v. Gessler, Denver District Court, Case Number 12-C V-2133, and Paladino, et. al., v. Gessler, Denver District Court, Case Number, 12-CV-2153.

Subject: Judicial review of various administrative rules concerning campaign and political finance promulgated by the Colorado Secretary of State.

Background/Issue: On or about April 6, 2012, Plaintiffs Colorado Ethics Watch ("CEW") and Colorado Common Cause ("CCC") filed a complaint seeking judicial review of agency action under section 24-4-106, C.R.S., against Secretary of State Scott Gessler ("Secretary") in Denver District Court. The complaint alleged that certain rules in the area of campaign and political finance promulgated by the Secretary must be set aside on the grounds that the the Secretary's promulgation of the particular rules exceeded the Secretary's authority, is arbitrary and capricious, or is otherwise contrary to law.

The particular rules at issue were promulgated in February, 2012, and took effect March 30, 2012.

The complaint filed by Colorado Ethics Watch and Colorado Common Cause challenged the following rules:1) Definition of electioneering communication (Rule 1.7); 2) Definition of political organization (Rules 1.7 and 7.2); 3) Definition of issue committee (Rule 1.12); 4) Definition of political committee (Rule 1.18); 5) Disclosure of major contributor information (Rule 18.1.8); and 6) Political party contribution limits (Rule 14.4). Plaintiffs requested judgment declaring the referenced rules null and void and sought an order permanently enjoining the Secretary from enforcing the same.

On or about April 20, 2012, David Paladino and 4 other named plaintiffs[18] filed a complaint against the Secretary in Denver District Court similarly challenging promulgation and enforcement of certain of the Secretary's rules affecting campaign and political finance.

[18] The other named plaintiffs are Michael Cerbo, Pro-Choice Colorado PAC, PPRM Ballot Issue Committee, and Citizens for Integrity, Inc.

The Paladino Complaint alleges that Rules 1.10, 1.12.3, 1.18.2, 6.2, 7.2.1, 14.1, and 14.4[19] 1) Are not supported by substantial evidence in the rulemaking record; 2) Are outside the authority delegated to the secretary of state; 3) Conflict with other provisions of law as specified in the Colorado constitution and the Colorado Revised Statutes; 4) Deny plaintiffs specific statutory rights, namely the substantial disclosure to which plaintiffs are constitutionally required; 5) Are contrary to constitutional rights, powers, privileges, and immunities, 6) Are arbitrary and capricious; and 7) Will cause plaintiffs irreparable injury.

The plaintiffs in the Paladino action requested declaratory and injunctive relief enjoining the Secretary from enforcing the provisions of the Rules.

The 2 complaints were consolidated in Denver District Court.

On August 10, 2012, the Court entered an order on Plaintiffs' challenges to the Rules. With respect to Rule 1.7 (definition of electioneering communication), the Court concluded that the Secretary did not modify or contravene an existing statute with respect to this particular rule. Further, this particular rule is similar to the rule enacted by the Secretary's predecessor and is, therefore, entitled to deference. For these reasons, the Court concluded that the Secretary acted within his authority in promulgating Rule 1.7

With respect to Rule 1.12.3 (determination of major purpose by issue committees), the Court found that the Secretary's addition by rule to the existing statutory requirement improperly modifies and contravenes applicable statutory provisions. Moreover, the Rule contains a test that is clearly at odds with the express intent of the legislature. For these reasons, the Court invalidated Rule 1.12.3 as exceeding the Secretary's legal authority.

---

[19] Rule 1.10 defines "influencing or attempting to influence" for purposes of the definition of "political organization". Rule 1.12.3 specifies how an issue committee's "major purpose" may be established. Rule 1.18.2 requires a political committee to have a "major purpose" and specifies how the major purpose is to be determined. Rule 6.2 governs transfers of money within a political party. Rule 7.2.1 concerns the definition of "political organization". Rule 14.1 exempts certain home rule municipalities and counties from constitutional and statutory campaign finance requirements. Rule 14.4 authorizes political parties at the level of a home rule county or municipality to establish a separate account for contributions or expenditures for supporting the party's county or municipal candidates.

The Court also invalidated Rule 1.18.2 (expenditure threshold for political committees) on the grounds that the limitation provided by the rule is contrary to the intent of the relevant provision in Article XXVIII of the Colorado constitution. Removing a critical element of the relevant constitutional provision at issue goes beyond the Secretary's powers. As such, he had exceeded his delegated authority.

With respect to Rules 1.10 and 7.2.1 (definition of "political organization"), the Court found that the Secretary's rules improperly narrowed the definition of the particular term at issue. The Rule is contrary to the clear terms of the statute and the intent of the legislature. Because the Secretary exceeded his authority with respect to these rules, Rules 1.10 and 7.2 were declared invalid.

The Court similarly invalidated Rule 1.18.1 (major contributor reporting penalties). Specifically, the Court found that the rule is contrary to the expressed interest in Section 1 of Article XXVIII of strong enforcement of campaign finance requirements. Furthermore, the rule removes an enforcement element from statutory provisions governing campaign finance enforcement. Accordingly, because the Secretary exceeded his delegated authority under the Administrative Procedures Act in promulgating this rule, Rule 1.18.8 was held invalid.

The Court found that Plaintiffs' claims with respect to Rules 4.1 and 15.6 (threshold limits for reporting contributions and expenditures by issue committees) are not ripe for decision in that the Secretary has expressly stated that these rules will not be enforced pending an outcome in *Colorado Common Cause v. Gessler* (This is the case discussed under II.K., above.).[20]

Status: The Secretary has commenced an appeal of the District Court's order. It is not expected that briefing on the appeal will take place until late 2012 or early 2013. In the meantime, the Secretary has announced that his office will not be enforcing Rules 1.10. 1.12.3, 1.18.2, 7.2.1, and 18.1.8 unless the District Court's order is reversed on appeal.

---

[20] The parties agreed that, in light of subsequent changes implemented by the Secretary, the challenges to Rules 6.1, 6.2, and 14 [affecting: 1) political parties and local offices; and 2) Home Rule requirements] are moot.

Counsel of record: Luis Toro and Margaret Perl are representing Colorado Ethics Watch. Jennifer Hunt of the law firm of Hill and Robbins, PC, is representing Colorado Common Cause. Mark Grueskin of the law firm of Heizer Paul Grueskin LLP is representing the Paladino plaintiffs. Attorney General John Suthers and Deputy Attorney General Maurice Knaizer are representing the Secretary.

Staff member monitoring the case: Bob Lackner.

****

N. *Tabor Foundation v. Colorado Bridge Enterprise*, Denver District Court, Case Number 12-CV-3113.

Subject: Whether the Colorado Bridge Enterprise's imposition of a bridge safety surcharge and issuance of revenue bonds without voter approval violates the Taxpayer's Bill of Rights (TABOR)[21].

Background/Issue: The Funding Advancements for Surface Transportation and Economic Recovery Act of 2009 ("FASTER"), sections 43-4-801 to 43-4-813,Colorado Revised Statutes, created the Colorado Bridge Enterprise ("Bridge Enterprise") as a government-owned business within the Colorado Department of Transportation ("CDOT") and gave the Bridge Enterprise the business purpose of financing, repairing, reconstructing, and maintaining state highway system bridges that are structurally deficient or functionally obsolete. FASTER also authorized the Bridge Enterprise to impose a bridge safety surcharge on motor vehicles registered in Colorado at the time of registration and to issue revenue bonds to finance its business activities.

FASTER declared the Bridge Enterprise to be an enterprise for purposes of TABOR ("TABOR enterprise"), which defines "enterprise" as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." A TABOR enterprise is exempt from all TABOR spending and revenue limits and may issue revenue bonds without

[21] Section 20 of Article X of the Colorado constitution.

prior voter approval, but may not impose taxes because the Colorado Supreme Court has held that the power to tax is inconsistent with the characteristics of a "business". In accordance with its statutory authority and statutorily declared TABOR enterprise status, the Bridge Enterprise imposed a bridge safety surcharge and issued revenue bonds without obtaining voter approval for either action.

On May 21, 2012, the Tabor Foundation ("Foundation"), which describes itself as "a nonprofit public-interest organization . . . dedicated to protecting and enforcing [TABOR]", filed a civil complaint in Denver District Court against the Bridge Enterprise, the Colorado Transportation Commission ("Commission"), and the members of the Commission, who also serve as the board of directors of the Enterprise. The Foundation alleges in its complaint that: (1) The Bridge Enterprise is not actually a TABOR enterprise; (2) It thus must comply with all applicable TABOR requirements; and (3) It violated TABOR by imposing the bridge safety surcharge, which the Foundation alleges to be both a tax and a tax policy change resulting in a net tax revenue gain to the Bridge Enterprise and CDOT, and issuing revenue bonds without prior voter approval. The Foundation further alleges that the Enterprise is not a TABOR enterprise because the state of Colorado granted it ownership of seventy-seven bridges, which amounted to a grant of more than ten percent of the Bridge Enterprise's revenue and because the bridge safety surcharge is a tax, which an enterprise may not impose, rather than a fee.

The Foundation requests that the court: (1) Declare the bridge safety surcharge unconstitutional and enjoin the Bridge Enterprise from imposing it in the future; (2) Declare the Bridge Enterprise's revenue bonds unconstitutional and enjoin the Bridge Enterprise from issuing additional revenue bonds until such time as it receives voter approval to do so; (3) In accordance with the remedy specified in TABOR when a government collects revenue in violation of TABOR requirements, order the refunding to taxpayers of all bridge safety surcharges collected in the four years preceding the filing of its lawsuit plus ten percent annual simple interest; and (4) Award the Foundation attorney fees and costs.

On August 14 and August 15, 2012, respectively, the Bridge Enterprise and the Commission, together with its individual members, (Defendants) filed separate, but substantially similar answers to the complaint. Defendants deny:

(1) All alleged TABOR violations; (2) That the bridge safety surcharge is a tax or a tax policy change resulting in a net tax revenue gain to the Bridge Enterprise or CDOT; (3) That the Bridge Enterprise's revenue bonds are debt for which TABOR requires voter approval; (4) That they received more than ten percent of their revenues in grants from the state; and (5) That the Foundation is entitled to any of the legal relief it seeks.

Defendants assert as affirmative defenses that: (1) The complaint fails to state a claim upon which relief can be granted; (2) The equitable doctrine of laches (a doctrine that bars claims that are unreasonably delayed in a way that prejudices the opposing party) bars the action; (3) Defendants performed all actions required by the Colorado constitution and Colorado statutes; (4) The Foundation lacks standing to bring the action; (5) The Foundation's allegations and causes of action are uncertain; and (6) Declaratory relief, even if granted, will not afford the Foundation present relief from the acts that it complains of.

Defendants request that the court: (1) Grant judgment on the merits in favor of Defendants; (2) Dismiss the complaint; and (3) Require the Foundation to pay Defendants' attorney fees and costs.

Status: The Denver District Court is considering the Foundation's complaint and the Defendants' answers.

Counsel of record: James Manley and Steven Lechner of the Mountain States Legal Foundation represent the TABOR Foundation. Harry Morrow, Megan Rundlet and Robert Huss of the Attorney General's Office represent the Bridge Enterprise. Mark Grueskin and Dean Heizer of Heizer, Paul, Grueskin LLP represent the Commission and the members of the Commission.

Staff member monitoring this case: Jason Gelender.

****

O. Colo. Union of Taxpayers Foundation v. City of Aspen, Pitkin County District Court, Case Number 12-CV-224.

Subject: Is a charge on disposable grocery bags a tax that requires prior voter approval under Section 20 of article X of the Colorado constitution (TABOR)?

Background: On May 1, 2012, the City of Aspen began charging a waste-reduction fee of 20 cents for each disposable paper bag that a customer receives from a grocery store. The purpose of the fee, along with a ban on grocery stores distributing disposable plastic bags, was to encourage customers to bring reusable bags for their groceries. Grocers must collect the fee and, except for a temporary allowance that may be retained by the grocers, remit the fee revenue to the city. The revenue from the fee is deposited into a Waste Reduction and Recycling Account to be used for education campaigns to reduce plastic bags, providing reusable bags, funding infrastructure to reduce waste, funding clean-up events, and other environment-related uses.

On August 21, 2012, the Colo. Union of Taxpayers Foundation (CUT) filed a lawsuit in the Pitkin County District Court against the City of Aspen and the members of the Aspen City Council. CUT alleges that the waste-reduction fee is actually a tax that is unconstitutional because the City of Aspen did not receive prior voter approval before it was levied. CUT seeks a declaration that the tax violates TABOR, a refund of all revenue collected, with 10% interest, and an award of their attorney fees and costs.

Status: The case is still in the pleading stage.

Counsel of record: CUT is represented by James M. Manley and Steven J. Lechner of the Mountain States Legal Foundation. The City is represented by the Aspen City Attorney's office.

Staff member monitoring the case: Ed DeCecco.

****

P. Denver Classroom Teachers Association v. School Dist. No. 1, Denver District Court, Case No. 11-CV- 4215.

Subject: Compliance with requirements of the Innovation Schools Act, Article 32.5 of title 22, C.R.S.

Background/Issue: The union for classroom teachers sued the Denver school district ("District") and the Denver school board ("School Board") for failing to comply with some of the requirements of the Innovation Schools Act.

Section 22-32.5-104 (3), Colorado Revised Statutes, requires innovation plans to include evidence that a majority of the administrators, teachers, and the school accountability committee consent to the designation as an innovation school. Under section 22-32.5-109 (1) (b), Colorado Revised Statutes, provisions of a collective bargaining agreement may only be waived upon the approval by secret ballot of at least 60% of the members of the bargaining unit employed by the school.

The District proposed that eight existing and two new schools become innovation schools. None of the innovation plans included evidence that a majority of the teachers approved the proposed innovation. No secret ballot was conducted. Instead, teachers hired at the school were required to agree that they would be at-will employees if hired at the schools. The School Board approved the innovation plans submitted to it by the District. The State Board of Education ("State Board") then approved the plans.

The union sued seeking a writ of mandamus compelling the District to obtain proof that a majority of the administrators, teachers, and school accountability committee at each school consented to the designation as innovation schools. Secondly, the union sought a writ of mandamus compelling the District to conduct a vote by secret ballot to waive the provisions of the collective bargaining agreement.

Status: The District and School Board first filed a motion to dismiss. The Court denied the motion. The Court set the case for a two-week trial commencing February 11, 2013.

On September 20, 2012, the Denver District and School Board filed a motion to add the State Board as an additional defendant. No response from the union has yet been filed.

Counsel of record: Plaintiffs are represented by Martha Houser and Bradely Bartels of CEA. The District and School Board is represented by Martin Semple of Semple, Farrington & Everall.

Staff member monitoring case: Jerry Barry.

****

Q. ***National Federation of Independent Business, et al v. Sebelius, Secretary of Health and Human Services, et al,*** **Nos. 11-393, 11-398 and 11-400 (June 28, 2012), 567 U.S. ___ (2012).**

Subject: Constitutionality of the "Patient Protection and Affordable Care Act", P.L. 111-48, as amended by The Health Care and Education Reconciliation Act of 2010, P.L. 111-152 ("PPACA" or the "Act").

Background/Issue: Immediately upon enactment of the Patient Protection and Affordable Care Act (PPACA) in March 2010, thirteen state Attorneys General, including Attorney General Suthers acting on behalf of the state of Colorado, filed a lawsuit against the United States Departments of Health and Human Services, Treasury, and Labor alleging the Act was unconstitutional. The amended complaint was filed on behalf of twenty-six state plaintiffs, including the state of Colorado, and two individually named plaintiffs. In addition, the National Federation of Independent Business ("NFIB") joined the lawsuit as a co-plaintiff on behalf of its members nationwide. In addition to the litigation in which Colorado was a plaintiff, the constitutionality of PPACA was addressed in other federal courts. Ultimately, the United States Supreme Court decided four questions relating to the health care litigation.

Status: On June 28, 2012, the United States Supreme Court issued an opinion resolving two provisions of PPACA: 1) The individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and 2) The Medicaid expansion, which gives funds to the states on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. The Supreme Court addressed the following four questions:

1) Does the Anti-Injunction Act preclude consideration of the shared responsibility payment as a tax prior to 2014?

2) Is it constitutional to mandate that all individuals purchase or maintain health coverage?

3) If the individual mandate is unconstitutional, is it severable from the remainder of PPACA?

4) Is it constitutional to force the states to expand Medicaid to help achieve expanded coverage?

The Anti-Injunction Act. The individual mandate requires most Americans to maintain health insurance coverage. Beginning in 2014, individuals who do not comply with the mandate must make a shared responsibility payment to the federal government. PPACA requires the penalty be paid to the Internal Revenue Service with an individual's taxes in the same manner as tax penalties. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. sec. 7421(a). Because of the Anti-Injunction Act, taxes can be challenged only after they are paid by suing for a refund. The challengers to this provision claim that the individual mandate's penalty is a tax within the meaning of the Anti-Injunction Act because it is a financial assessment collected by the IRS through the normal means of taxation, therefore the individual mandate cannot be challenged until after the penalty is paid in 2014.

The Court disagreed with the argument that, because PPACA requires the penalty be assessed and collected in the same manner as taxes, the Anti-Injunction Act is applicable to this penalty. Instead the Court agreed with the government's argument that PPACA does not direct courts to apply the Anti-Injunction Act. The opinion stated that "It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question." In the case of the individual mandate, Congress chose to call it a penalty, so the Court assumed that Congress did not intend for the Anti-Injunction Act to apply. The decision states that PPACA does not require that the penalty for failing to comply with the individual mandate be treated as a tax for the purpose of the Anti-Injunction Act. With this determination, the Court proceeded to the merits of the case.

Constitutionality of the Individual Mandate. The Court ruled that the individual mandate is not a valid exercise of Congress' power under the commerce clause of the U.S. Constitution to regulate interstate commerce among the states. Specifically, Congress may not require people to engage in commerce for the purpose of regulating the same and the power to regulate

commerce presupposes that there is some commerce going on. The Court also ruled that the individual mandate is not a valid exercise of Congress's power under the necessary and proper clause which gives power to Congress to make all laws that are necessary and proper for carrying into execution all powers vested in the Constitution in the government or any department or office of the government. Chief Justice Robert's opinion stated that the individual mandate was "necessary", but not "proper". The Constitution does not grant Congress the power to compel commerce into being or to compel commerce. Therefore the individual mandate's compulsion of commerce is not an incident of the power to regulate commerce, and thus not proper.

The Court ruled that the requirement to make a shared responsibility payment is constitutional under the taxing power granted to Congress by the Constitution. The Court determined that the shared responsibility payment is a tax and what Congress has done is increase taxes on those who have a certain amount of income, but choose to go without health insurance. The Court stated that the federal government does not have the power to order people to buy health insurance and the individual mandate would be unconstitutional if read as a command. It further stated that the federal government does have the power to impose a tax on those without health insurance and because the individual mandate can be reasonably read as a tax, it is constitutional.

Since the individual mandate was found to be constitutional, there was no need for the Court to address the third question.

Medicaid expansion. PPACA requires states to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line and establishes an essential benefits package that states must provide to all new Medicaid recipients. The states contended that the Medicaid expansion exceeded Congress's authority under the spending clause. The spending clause grants Congress the power to pay the debts and provide for the general welfare of the United States.

The Court held that Congress may use its spending power under section 8 of article 1 of the United States Constitution to appropriate federal funds to states with conditions that Congress would not otherwise require them to follow, but there are limits on Congress's power to secure a state's compliance. Congress may persuade with its spending power but it may not coerce.

The Court stated that "As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act."

The bottom line result of the *NFIB* case is that the Court upheld *all* of the PPACA except for the federal enforcement penalty against a state that does not expand Medicaid to new populations. As a result of the Court's ruling, states can voluntarily participate or may choose not to participate in the Medicaid "expansion" program. A state that chooses not to participate in the "expansion" program will not receive the new federal funding for the expansion program, but will not risk losing program funding for its existing Medicaid program.

Staff members monitoring the case: Kristen Forrestal and Brita Darling**.**