SUMMARY OF LITIGATION AFFECTING THE COLORADO GENERAL ASSEMBLY AS OF DECEMBER 16, 2013

OFFICE OF LEGISLATIVE LEGAL SERVICES

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I. **Litigation in which either the General Assembly 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.

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 attorney's 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 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.

Status:

Oral argument on the appeal was held before the Supreme Court on June 12, 2013. As of the preparation of this document, the Supreme Court has not entered a ruling on the case.

Counsel of record: The Representatives' counsel is 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.

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b. ***Low Voltage Wiring, Ltd. d/b/a LVW Electronics v. Colorado General Assembly,*** **Denver District Court, 13-CV-31567**

Subject: Breach and performance issues arising out of a contract between the General Assembly and a vendor for installation of new voting systems.

Background/Issue:

This case arises from a contract between Low Voltage Wiring, Ltd. d/b/a LVW Electronics ("LVW") and the General Assembly to replace the voting system hardware and software in the House of Representatives and the Senate in 2008. LVW was awarded a bid in 2007 to remove the old voting system from the House and to replace the hardware with new, state of the art, hardware, and develop custom computer programming necessary for the new voting system in the House. As part of this contract, LVW also agreed to develop custom computer programming and hardware necessary for the new voting system in the Senate.

LVW and the General Assembly entered into the contract in January 2008. The contract required LVW to complete its performance by the end of June 2008. The parties amended the contract to extend the date of performance to July 30, 2008. Although LVW substantially completed its work on the new House voting system in time for it to be used in the 2009 Regular Session, LVW failed to timely complete development of the Senate voting system until January 2012, and, arguably, failed to complete performance of the contract by refusing to provide Legislative Council Staff/Legislative Information Services with complete documentation of the computer software and forty hours of training required under the contract. The General Assembly withheld final payment on the contract as a result of LVW's failure to complete performance. In addition, the General Assembly needed to hire another contractor to reverse-engineer LVW's computer programming, provide documentation of the software, and provide training on system maintenance to the General Assembly's information technology staff.

LVW sued the General Assembly for nearly double the original contract price for the job, claiming that the General Assembly required LVW to develop computer programming outside the scope of

the original contract. The General Assembly disputes LVW's claim and has filed a counterclaim seeking the amount of money the General Assembly paid to the additional contractor to complete LVW's original contract performance.

Status:

The case is currently set for trial on the Denver District Court Civil Procedure Civil Access Pilot Project Docket on March 24, 2014. The parties are in the process of conducting discovery in the litigation. To date, the parties have produced relevant documents, asked and answered discovery requests, and deposed numerous witnesses. In May 2013, the General Assembly filed a motion to dismiss. The court denied the General Assembly's motion on the grounds that, at that stage of the litigation, the court must resolve doubts in favor of LVW's position so long as evidence could be developed in support of LVW's contentions, and as of the date, insufficient evidence had been developed to grant the General Assembly's motion. LVW also filed a motion to dismiss the General Assembly's counterclaim. The court denied LVW's motion to dismiss the General Assembly's counterclaim. In November 2013, based on the evidence that has been developed through discovery, the General Assembly filed a motion for summary judgment, renewing arguments made in the motion to dismiss and raising additional arguments. This motion is currently pending before the court. The parties plan to depose additional witnesses.

Counsel of record: The counsel for the General Assembly is Maureen Reidy Witt and Diego G. Hunt of Holland & Hart LLP. LVW is represented by Durward E. Timmons and Ryan J. Klein of Sherman & Howard, LLC.

Staff member monitoring this case: Bart Miller.

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c. ***Joseph Neville v. Colorado General Assembly*, United States District Court for the District of Colorado, Civil Action Number 13-CV-02735**; ***Joseph Neville v. Lucia Guzman, Bill Cadman, Rollie Heath, Mark Ferrandino, Brian DelGrosso, and Dickey Hullinghorst*, United States District Court for the District of Colorado, Civil Action Number 13-CV-03124.**

Subject: Constitutionality of Joint Rule 36(b)(1) (Prohibited practice for lobbyist to threaten reprisal against a legislator).

Background/Issue:

Plaintiff Neville filed this lawsuit on October 7, 2013. Plaintiff is a registered professional lobbyist representing the Rocky Mountain Gun Owners. This suit is based on a complaint that was filed by Representative Cheri Gerou alleging that Plaintiff violated Joint Rule 36 (b) (1) by threatening Representative Gerou with political reprisal (retribution) with the intent thereby to alter or affect her vote concerning a matter that was to be considered by the House of Representatives. The complaint

against Neville was based on an exchange that occurred between him and Representative Gerou in the House lobby on February 15, 2013, the same day that the House of Representatives was considering HB 13-1224, *Concerning Prohibiting Large-Capacity Ammunition Magazines*, HB 13-1229, *Concerning Criminal Background Checks Performed Pursuant to the Transfer of a Firearm*, and other gun legislation.

Pursuant to the procedures set forth in Joint Rule 36 (d) (1), the Executive Committee met and determined that the Joint Rule 36 complaint appeared to be meritorious. Thereafter, the Senate President and the Speaker of the House of Representatives appointed two members to a committee and those two members, in turn, selected a third member. The committee thus comprised was charged under the rule with interviewing the parties involved, as well as any other persons who would be able to provide relevant information, and presenting the facts and information they obtained to the Executive Committee. The investigatory committee met five times during March and April of 2013. At its first meeting, Plaintiff's attorney, Shawn Mitchell, made a statement to the committee claiming that Joint Rule 36 was overly broad and an unconstitutional infringement on Plaintiff's First Amendment right of free speech. However, Neville was present at the committee's second meeting and answered questions posed by members of the committee and submitted documentation responsive to their requests. At the committee's third meeting, Plaintiff read a prepared statement to the committee in which he expressed his opinion that Joint Rule 36 is unconstitutional and declined to participate further in the process. Neville did not appear again before the committee, despite its request that he appear to provide additional testimony at subsequent meetings and to provide certain documents to the committee.

The investigatory committee ultimately finalized its report with the facts and information it had gathered and submitted it to the members of the Executive Committee on August 20, 2013. The Executive Committee considered the report at a hearing on November 19, 2013, and unanimously voted to dismiss the complaint due to the fact that it had insufficient evidence to determine whether Plaintiff had the requisite intent to alter or affect Representative Gerou's vote. Nevertheless, the members of the Executive Committee expressed their concern that Plaintiff's conduct was deplorable and disrespectful to the legislative process and the institution.

Before the Executive Committee even met to consider the report from the investigatory committee, Plaintiff filed a lawsuit in federal district court asserting four claims for declaratory and injunctive relief against the Colorado General Assembly based on 42 U.S.C. §1983 as follows: 1) The Plaintiff has an objectively justified fear of real consequences that could affect his living as a lobbyist since the Defendant's conduct is placing him under a reasonable fear that his ability to lobby will be taken away causing him to lose his livelihood; 2) The rule is substantially overbroad because, in addition to proscribing "true threats", it also sweeps within its proscription a significant amount of protected core political speech, thereby creating a chilling effect on protected core political speech; 3) The term "political reprisal" as used in Joint Rule 36 (b) (1) is unconstitutionally vague and therefore void; and 4) The rule violates the Plaintiff's First Amendment right to petition the government.

Plaintiff seeks a declaratory judgment that: 1) Joint Rule 36 (b) (1) is unconstitutional as applied to his conduct; 2) Joint Rule 36 (b) (1) is unconstitutional because it is substantially overbroad; 3) Defendant has violated Plaintiff's constitutional rights by retaliating against him for his exercise of his right to free speech; 4) Defendant has violated Plaintiff's constitutional rights by retaliating against him for his exercise of his right to petition the government for redress of grievances; and 5) Joint Rule 36 (b) (1) is unconstitutionally vague and therefore violates the Fourteenth Amendment and is void. Plaintiff also seeks a preliminary and permanent injunction enjoining the Defendant from administering or enforcing any provisions of Joint Rule 36 (b) (1); a preliminary and permanent injunction enjoining Defendant from administering or enforcing any provisions of Joint Rule 36 (b) (1) found to be unconstitutional as applied in this matter; payment of his attorney fees and costs; and pre-judgment and post-judgment interest.

On October 29, 2013, Defendant filed a Motion to Dismiss under Fed.R.Civ.P 12 (b) (1), for lack of subject-matter jurisdiction since the state of Colorado and the Colorado General Assembly do not fall within the meaning of the term "person" against whom relief may be sought under 42 U.S.C. §1983.

Status:

On November 8, 2013, Plaintiff filed a Notice of Dismissal of this action. OLLS staff believes Plaintiff voluntarily dismissed this action because it is based on 42 U.S.C. §1983 which must be brought against one or more persons, not an entity or institution. In support of this belief, on November 19, 2013, Plaintiff re-filed the action in federal district court naming the six members of the Executive Committee of the Colorado General Assembly, rather than the institution, as Defendants and seeking the same relief as in the original filing. However, Plaintiff filed a voluntary Notice of Dismissal of that action on December 5, 2013.

Counsel of record: Plaintiff's counsel is Barry Arrington and Shawn Mitchell. The General Assembly is represented by Edward Ramey, Martha Tierney, and Dean Heizer with the law firm of Heizer Paul, LLP.

Staff members monitoring this case: Dan Cartin, Sharon Eubanks, Jennifer Gilroy, and Jennifer Berman.

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d. ***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[1], 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.

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[2] and sections 31 and 32 of article V of the Colorado Constitution[3] 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

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

[2] 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.

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

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.[4] 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.

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

[4] 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.

for an interlocutory appeal on September 24, 2012, and the parties submitted briefing on the appeal between November 2012 and May 2013. In late February and early March of 2013, the General Assembly considered and ultimately adopted Senate Joint Resolution 13-016, which authorizes and directs the Committee on Legal Services ("COLS") to retain legal counsel to represent the General Assembly as amicus curiae in any lawsuit for the purpose of participating only to address the issue of standing of legislator-Plaintiffs when standing is based upon an institutional interest of the General Assembly. Based upon the authority granted by Senate Joint Resolution 13-016, on March 19, 2013, the COLS approved the General Assembly's participation as an amicus curiae in this matter on the limited issue of the standing of legislator-Plaintiffs which is based upon advancing the institutional interest of the General Assembly to enact laws on taxation and appropriations. The COLS also retained legal counsel who filed a brief on the appeal on behalf of the General Assembly as an amicus curiae in support of Plaintiffs/Appellees and affirmance on the issue of legislative standing.

The District Court has stayed the litigation pending consideration of the interlocutory appeal. Oral argument in the interlocutory appeal took place before a panel of the Tenth Circuit on September 23, 2013. As of the date of the preparation of this document, the Tenth Circuit has not entered a ruling.

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. The Colorado General Assembly is represented by Maureen Witt and Stephen Masciocchi of Holland and Hart LLP.

Staff members monitoring the case: Sharon Eubanks and Bob Lackner

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

a. Education

i. *Lobato v. State of Colo. Board of Education, Case Number 2013-CO-30 (Lobato II)*

Subject: The constitutionality of Colorado's public school financing system.

Background/Issue:

In 2005, the Plaintiffs (a group of parents, students, and school districts) brought suit in Denver District Court claiming that the Defendants (State of Colorado, et. al) have failed to maintain a "thorough and uniform system" of public education, as required by section 2 of article IX of the Colorado Constitution ("Education Clause"), because the funding system for public schools is irrational and inadequate. The Plaintiffs also claimed that the funding system failed to provide school districts enough money to enable them to exercise local control as granted in section 15 of article IX of the Colorado Constitution ("Local Control Clause"). The Defendants' motion to dismiss the complaint was granted by the trial court on the grounds that the Plaintiffs did not have standing and that the claim was a nonjusticiable political question. The Court of Appeals affirmed.

The Colorado Supreme Court reversed the Court of Appeals in *Lobato v. State* (218 P.3d 358 (Colo. 2008)) ("Lobato I"), and the case proceeded to trial. The Denver District Court held that the school financing system is unconstitutional because it is not rationally related to the General Assembly's mandate under the Education Clause. The District Court found that the school financing system bears no relation to the cost to schools to meet the requirements of the standards-based education and accountability statutes. Further, the financing system fails to provide sufficient financial resources to school districts to permit them to provide the services, instructional programs, materials, and facilities that are necessary to meet statutory requirements for standards-based education. This violates the Local Control Clause because the significant underfunding of education prohibits the school district from exercising control over instruction. The District Court estimated that the public school system was underfunded by between $1.35 billion and $4.15 billion. The District Court enjoined the Defendants from implementing and enforcing the existing Public School Finance Act and required the Defendants to design, enact, and fund a school financing system that is rationally related to accomplishing the purposes of the Education Clause and Local Control Clause. The District Court stayed enforcement of the order to give the State time to create and implement a new school financing system and until final action by the Supreme Court on appeal.

In 2012, the Defendants filed a direct appeal to the Colorado Supreme Court. The questions considered were: (1) whether the Plaintiffs' claims present a nonjusticiable political question; (2) whether the public school financing system satisfies the rational basis test articulated in Lobato I and therefore complies with the Education Clause; and (3) whether the public school financing system is constitutional under the Local Control Clause.

As a threshold matter, applying the law of the case doctrine, the Colorado Supreme Court affirmed its decision in Lobato I that the Plaintiffs' claims are justiciable. The Supreme Court held that determining whether the state's public school financing system is rationally related to the constitutional mandate of the General Assembly to provide a "thorough and uniform system of public education" does not infringe on the legislature's policy-making authority and is therefore not a nonjusticiable political question.

With respect to the Plaintiffs' claim that the public school financing system contained in sections 22-54-101 to 22-54-135, C.R.S., violates the Education Clause, the Supreme Court first defined the phrase "thorough and uniform." The Supreme Court held that "the phrase thorough and uniform in the Education Clause describes a free public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state." Further, the Supreme Court held the Education Clause of the Colorado Constitution "simply establishes the constitutional floor upon which the General Assembly must build its education policy."

The Supreme Court then applied the "rational basis test" that the Supreme Court delineated in Lobato I. Presuming that the statutes that make up the public school financing system are constitutional, the Supreme Court determined that it must uphold the legislation unless the Plaintiffs prove beyond a reasonable doubt that the statutes are not rationally related to the General Assembly's mandate under the Education Clause to provide a "thorough and uniform system of public education." The Supreme Court held that Colorado's public school financing system is rationally related to the "thorough and uniform" mandate of the Education Clause because it funds a public education system that is of a quality marked by completeness, is comprehensive, and is consistent across the state. In doing so, the Court highlighted the General Assembly's creation of a single statutory framework that allows the state to calculate every school district's total program, describes the sources of state and local revenue that make up the calculated amounts, and applies the public school financing system uniformly to all school districts in the state. While the Supreme Court recognized that the public school financing system may not provide an optimal amount of money for the public schools, the statutory framework itself is constitutional.

With respect to the Plaintiffs' claim that the public school financing system violates the Local Control Clause, the Supreme Court held that the public school financing system is constitutional because the system gives school districts control over locally raised funds and therefore over "instruction in the public schools." Citing prior case law, the Supreme Court affirmed that a dual-funded (local and state moneys) public school financing system is constitutional so long as it allows the school districts to retain control over how they spend locally generated tax revenue. The Supreme Court noted that, even though the trial court found that school districts use a substantial portion of their locally raised funds to help students achieve state standards, nothing in the public school financing system itself requires a particular allocation of funds. Further, the financing system also provides mill levy overrides and bonded indebtedness mechanisms that authorize school districts to raise additional revenue beyond their total program, thereby allowing the school districts to exert additional local control over instruction by generating and expending supplemental local funds. While "disparities in wealth" may impair a low-wealth school district's ability to pass mill levy

overrides or bonded indebtedness and, thus, its ability to exert local control, this does not invalidate the entire public school financing system under the Local Control Clause. Therefore, because the public school financing system does not affirmatively require school districts to use their locally raised revenue in a particular manner, the statutory system is constitutional.

In conclusion, the Supreme Court found that the Court's job is not to determine whether a better financing system could be devised by the General Assembly but whether the current public school financing system passes constitutional muster. In entering its decision that the public school financing system is constitutional, the Supreme Court further found that it had satisfied its duty to "say what the law is" without unduly infringing upon the policy-making power of the legislature, thereby affording the General Assembly the opportunity to reform Colorado's education policy, including its public school financing system.

Status:

The judgment of the Denver District Court is reversed and the case is concluded.

Counsel of record: The numerous Plaintiffs-Appellees were represented by various attorneys. The Defendants-Appellants were represented by the Attorney General's office. Several amici curiae briefs were filed.

Staff member monitoring this case: Brita Darling

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

Subject: 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), C.R.S., requires innovation plans to include evidence that a majority of the administrators, teachers, and the school accountability committee members consent to the designation as an innovation school. Under section 22-32.5-109 (1) (b), C.R.S., provisions of a collective bargaining agreement may be waived only 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. Rather teachers considered for positions at each school were required to agree that they would be at will employees if hired at the school. The School Board

approved the innovation plans that the District submitted to it. 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 members at each school consent to the designation as an innovation school. Second, 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.

A trial to the court was held February 11 through 19, 2013. The Court entered an Amended Final Order on July 11, 2013.

The court found that the schools at issue fell into three categories: Existing schools that were subject to turnaround plans and were converted into innovation schools; new schools that replaced existing legacy schools that were subject to a turnaround plans; and two new schools that were required because of population growth in the Stapleton area.

For the existing schools that were subject to turnaround plans and new schools that replaced existing legacy schools that were subject to turnaround plans, the court found that the school district had substantially complied with state statutes concerning innovation schools and denied Plaintiffs' request for declaratory judgment. The court found that, pursuant to statute, the teachers at the existing schools were terminated from those schools and were not entitled to vote on any innovation plan. The district conducted elections by the new teachers who were hired at those schools who overwhelmingly approved the innovation plans.

For the new schools, the court entered an order that the principals, teachers, parents, and community leaders at the two new schools must establish a task force to review the schools' innovation plans and determine if there should be any changes to those plans. The District must then submit the plans or modified plans to the teachers, administrators, and school advisory committees at the schools for formal approval. If any waiver of the collective bargaining agreement is included in the plan, it must be submitted to a secret ballot of the members of the collective bargaining unit at each school, and requires approval by at least 60% of those members.

Status:

Plaintiffs filed a notice of appeal and the school district filed a notice of cross appeal. The case is currently awaiting briefing in the Colorado Court of Appeals.

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

Staff member monitoring case: Jerry Barry

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iii. Taxpayers for Public Education, et al., v. Douglas County School District, et al., Colorado Court of Appeals, Case Number 2013-COA-20.

Subject: Constitutionality of Douglas County School District's Choice Scholarship Program (CSP) providing scholarships to students for tuition expenses at participating private schools.

Background/Issue:

The Douglas County School District created a charter school to distribute tuition scholarships equal to the 75% of the per pupil revenue received by the district for the student. The school district may retain 25% of the per pupil revenue to administer the CSP. Scholarships were paid to the child's parents through quarterly checks that the parents endorsed to the participating private schools. To qualify, a student must have been enrolled in the district for at least one year and must agree to take district assessments. The majority of the participating private schools are funded in part by and affiliated with a religious organization. The Plaintiffs filed suit in Denver District Court seeking a declaration that the CSP violates the Public School Finance Act of 1994, article 54 of title 22, C.R.S. 2012 (the Act), and various provisions of the Colorado Constitution. The Plaintiff also sought an order enjoining the implementation of the CSP. The Defendants moved to dismiss the complaint, and Plaintiffs moved for a preliminary injunction.

After a 3-day hearing on the motions, the district court found that the CSP violated the Act and Article II, section 4; Article V, section 34; and Article IX, sections 3, 7, and 8 of the Colorado Constitution. Acting *sua sponte*, the district court entered a permanent injunction, and this appeal was filed. On February 28, 2013, the Court of Appeals reversed the district court's injunction and remanded for entry of judgment in Defendants' favor.

With respect to the claims on appeal, the court initially ruled that the Plaintiffs lacked standing to bring a claim for enforcement of the Act and therefore did not consider the merit of the claims relating to the Act. The Act expressly commits enforcement of its provisions to the State Board of Education (SBE) and provides mechanisms for the SBE to exercise that authority. The court found that a private right of action would be inconsistent with the Act's purposes. The court further found that the Plaintiffs did not have standing based on taxpayer status. While recognized in the context of constitutional violations, the court found no authority for asserting taxpayer status in the context of enforcing a statute.

With respect to the constitutional claims, the court made the following findings and conclusions of law:

1. A board of education is a legislative body and a political subdivision of the state. As such, the CSP is entitled to a presumption of constitutionality. The CSP must be upheld unless Plaintiffs prove that it is unconstitutional beyond a reasonable doubt and that a clear and unmistakable conflict exists between the CSP and a provision of the Colorado Constitution.

2. Relying primarily on *Lujan v. Colo. State Bd. of Educ.,* 649 P.2d 1005, (Colo. 1982), the court determined that Article IX, section 2, requiring the General Assembly to provide for a thorough and uniform system of free public schools in the state, does not prevent a school district from providing educational opportunities in addition to and different from the thorough and uniform system required by the constitution, and that a school district may expend public funds to do so. Further, the fact that a private school ultimately receives funds that were distributed to the district as per pupil revenue does not transform the private school into a public school subject to the uniformity requirement. Finally, the retention by the school district of 25% of the per pupil revenue for these students does not violate the constitution by diverting funds from other districts because the CSP students must be residents of the district and the evidence showed that the students would have otherwise enrolled in the district.

3. The CSP does not violate Article IX, section 3, requiring moneys from the public school fund (fund) to be expended for the maintenance of the schools of the state and to be distributed to the counties and school districts of the state. Although a small portion of a district's per pupil funding comes from the public school fund, the constitutional prohibition applies to distributions made by the state. Upon distribution to counties and school districts, the moneys belong to the counties and school districts. Further, the court presumed that, since distributions from the fund represent less than 2% of public school funding, the CSP will be funded out of moneys that do not come from the fund.

4. The CSP does not violate Article IX, section 15, providing that school district boards have control of instruction in the public schools of the district, because this provision is aimed at ensuring that the state does not encroach upon the prerogative of local districts to control instruction and, additionally, the provision does not relate to instruction in private schools.

5. With respect to the constitutional provisions of Article II, section 4; Article V, section 34; and Article IX, sections 7 and 8; that pertain to religion, religious institutions, and support for religious institutions, the court declined to hold that the Colorado Constitution's religious provisions are coextensive with the Religion Clauses of the First Amendment of the United States Constitution.

6. Relying primarily on the analysis in *Americans United for Separation of Church and State Fund Inc.,* v. State, 648 P.2d 1072 (Colo. 1982) and Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir. 2008), the court determined that the CSP did not violate Article II, section 4, because the CSP is "neutral", in that the purpose of the CSP is to aid students and parents, not sectarian institutions. Further, the CSP is available to all district students and to any private school that meets the neutral eligibility criteria without impermissible inquiry into or judgments related to the pervasiveness of the institution's religious beliefs. Finally, no student is compelled to participate in the CSP or to attend any particular participating

school. Any student's attendance at religious services happens as a result of the parent's voluntary choices.

7. The CSP does not violate Article IX, section 7, prohibiting anything in aid of any church or sectarian society or anything supporting or sustaining any school controlled by any church or sectarian denomination. Citing *Americans United and Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), the court determined that, since the CSP is intended to benefit students and their parents, any benefit to the participating school is incidental and does not constitute aid to the institution itself within the meaning of Article IX, section 7. The court did not find any distinction in its analysis of this issue between institutions of higher education and elementary and secondary schools.

8. The CSP does not violate Article IX, section 8, prohibiting, in part, a religious test or qualification as a condition of admission to a public educational institution of the state or requiring attendance or participation in a religious service. The provision clearly applies to public educational institutions and public schools and not to private schools. Parents choose the participating school and any attendance is by parental choice. Further, the fact that students are enrolled in the public charter school for administrative purposes does not impute the requirements of the participating private school to the charter school, nor does it transform the private school into a public school.

9. The CSP does not violate Article V, sections 32 and 34, relating to appropriations of the General Assembly and prohibiting appropriations for educational purposes to a person or entity not under the absolute control of the state or to any denominational or sectarian institution or association. The provision relates to appropriations by the General Assembly itself. The General Assembly's appropriations are transmitted to the Colorado Department of Education and distributed to the school districts. Ownership of the funds passes to the local school district, and the school district's expenditure of funds under the CSP does not constitute an appropriation of the General Assembly. Further, citing *Americans United*, the court noted that the benefit is to assist the student, not the institution, and the aid serves a discrete and particularized public purpose.

Because Plaintiffs failed to carry their burden of proving the unconstitutionality of the CSP beyond a reasonable doubt and none of the Plaintiffs have standing to assert a claim under the Act, the court lifted the permanent injunction.

Status:

On April 11, 2013, the Plaintiffs filed a petition for writ of certiorari to the Colorado Supreme Court. As of December 16, 2013, the Supreme Court has not yet issued a ruling on the petition.

Counsel of record: The Plaintiffs are represented by Faegre Baker Daniels LLP; Alexander Halpern LLC; Arnold & Porter LLP; American Civil Liberties Union Foundation of Colorado; ACLU

Foundation Program on Freedom of Religion and Belief; and Americans United for the Separation of Church and State. The Defendants are represented by Rothgerber Johnson & Lyons, LLP, and the Colorado Attorney General's Office.

Staff member monitoring this case: Brita Darling

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b. Elections

i. ***Colorado Common Cause and Colorado Ethics Watch v. Gessler*, Denver District Court, Case Number 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.[5] Subjecting Colorado law on issue committee disclosure to exacting scrutiny, the Tenth Circuit held that the governing law unconstitutionally burdened the *Sampson* Plaintiffs' First 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.[6] 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

[5] 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.

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

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 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.[7] 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.[8] 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 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 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.

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[7] 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.

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

Status:

The Secretary filed a petition for writ of certiorari with the Colorado Supreme Court seeking reversal of the decision of the Court of Appeals. The Supreme Court granted the petition on May 28, 2013. The Supreme Court granted certiorari on the issues of: A) Whether the Secretary correctly concluded that *Sampson* invalidated registration and reporting requirements for all similarly situated issue committees; and B) Whether the Secretary's rule-making authority extends to promulgating a rule that establishes a line at which an issue committee's contributions or expenditures exceed the burden of state regulation.

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. The Attorney General's office is representing the Secretary.

Staff member monitoring this case: Bob Lackner

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ii. ***Gessler v. Johnson*, Denver District Court, Case Number 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:

Under prior Colorado law, an elector's voter registration record was marked "Inactive - Failed to Vote" ("IFTV") after he or she did not vote in one general election. *See* former section 1-2-605 (2), Colorado Revised Statutes. Although an inactive elector remained registered (and able) to vote, the practical consequence of being deemed inactive was that the elector would not receive a mail ballot, even if he or she previously opted to become a permanent mail-in voter. An inactive elector could 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, his or her county clerk and recorder ("Clerk"), by applying for a mail-in ballot, or by voting in an election].

In connection with the statewide ballot issue election scheduled for November 2011, Denver County ("Denver") had planned to mail ballots to all registered electors in the county, active and inactive alike, as it had done in all five of its previous mail ballot elections. After Denver announced its intention to so do, the Secretary of State ("Secretary") issued an order to Denver ordering the county to desist from sending mail ballots to registered electors who were classified as inactive for failure to vote. The order was premised on the Secretary's interpretation that section 1-7.5-107 (3)(a)(I) of the "Mail Ballot Election Act" (article 7.5 of title 1, Colorado Revised Statutes) required such ballots to be sent only to active registered voters.

On September 21, 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 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. In response, Defendant Johnson asserted that the statutory language at issue did not prohibit her from mailing mail ballots to inactive electors. To the contrary, she argued, the relevant statute established a minimum standard with which elections officials were required to comply. In accordance with the Uniform Election Code's policy goals of promoting and facilitating voting, Clerk Johnson asserted that local elections officials should not be estopped from sending mail ballots to IFTV electors.

The Pueblo County Clerk and Recorder, Gilbert Ortiz, and Colorado Common Cause were subsequently permitted to intervene in the lawsuit.

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. After that ruling, Denver and Pueblo Counties proceeded with their plans to send mail ballots to inactive voters for the November 2011 election.

The case on the underlying claims was set for trial on the merits on January 28, 2013, in Denver District Court. However, on January 21, 2013, Denver District Court Judge Bronfin issued an order on the cross-motions for summary judgment. Briefly, that order:

- Denied the Secretary's Motion for Summary Judgment against the Denver and Pueblo Clerks regarding interpretation of the Mail Ballot Election Act and granted Clerk Johnson's Motion for Summary Judgment on that point;
- Did not reach the claim by Intervenor Colorado Common Cause that the Secretary's interpretation of the Mail Ballot Election Act was unconstitutional, nor the Secretary's claim that Colorado Common Cause lacked associational standing to pursue the constitutional claims;
- Granted the Pueblo Clerk's motion for summary judgment that mail ballots could be sent to covered voters under the "Uniform Military and Overseas Voters Act" (and denied the Secretary's motion for summary judgment on the same claim);
- Declined to rule on the Secretary's request for declaratory relief and the Denver Clerk's motion for judgment on the pleadings, reasoning that, because the resolution of the interpretation of the Mail Ballot Election Act left no case or controversy, adjudication of those claims would involve the rendering of an advisory opinion; and
- Dismissed, without prejudice, the remaining claims in the case.

Regarding the Mail Ballot Election Act interpretation, the Court analyzed the legislative history of the specific provision at issue, as well as general principles enunciated under the Uniform Election Code, to conclude that elections officials were statutorily permitted to send mail ballots to IFTV voters. The Mail Ballot Election Act, the Court held, must be construed in a manner that increases (rather than limits or decreases) voter participation in elections. Further, nothing in that Act evinced legislative intent to preclude IFTV voters from receiving mail ballots. The Court's reading comports

with the Uniform Election Code's expressly stated goal that it be interpreted in such manner so as to allow eligible electors to vote.

Status:

The January 21, 2013, order resolved all the outstanding issues in the case and obviated the need to conduct the bench trial.

The General Assembly, in the 2013 session, passed the "Voter Access and Modernized Elections Act" (House Bill 13-1303). That Act, *inter alia*, eliminated the status of inactive voters by reason of failure to vote.

Counsel of record: The Secretary of State was represented by the Attorney General's Office. Defendant Clerk Johnson was represented by Vicki Ortega and David Cooke of the Denver City Attorney's office. Intervenor-Defendant Clerk Ortiz was represented by Daniel Kogovsek and Peter Blood of the Pueblo County Attorney's Office. Intervenor-Defendant Colorado Common Cause was represented by J. Lee Gray and Jesse Horn of Holland & Hart and by Myrna Perez and Jonathan Brater at the Brennan Center for Justice at NYU School of Law.

Staff member monitoring the case: Kate Meyer

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iii. ***Colorado Ethics Watch and Colorado Common Cause v. Gessler*, Denver District Court, Case Number 12-CV-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 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[9] 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.

The Paladino Complaint alleges that Rules 1.10, 1.12.3, 1.18.2, 6.2, 7.2.1, 14.1, and 14.4[10]: 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 District 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.

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

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

[10] 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.

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 the Colorado Constitution 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* (discussed under II.K., above).[11]

Status:

The Secretary commenced an appeal of the District Court's order. On appeal, the Secretary challenged the District Court's judgment invalidating the new rules. On cross-appeal, CEW sought reversal of the District Court's determination as to new Rule 1.7. Oral argument before the Court of Appeals was held on September 4, 2013.

By order dated December, 12, 2013, the Court of Appeals affirmed the District Court's judgment as to Rules 1.12, 1.18, 7.2, and 1.10 but reversed the District Court's judgment as to Rule 1.7. In its order, the Court of Appeals found the following:

- Rule 1.12 (major purpose of issue committees) is arbitrary, capricious, or manifestly contrary to the statute because the 30% threshold found in the Rule is not supported by competent evidence in the record. Moreover, even if there was competent evidence in the record to support the 30% threshold, the Rule does not resolve the ambiguity as to how a "pattern of conduct" must be demonstrated. Thus, the Rule's 30% threshold is manifestly contrary to the statute's use of the phrase "pattern of conduct" in its definition of "major purpose".
- Rule 1.18 (definition of political committee) is invalid because the provisions of section 2 (12) of Article XXVIII are clear and unambiguous: political committees are defined by their contributions or expenditures and not by an additional major purpose test. Because the provisions are clear, there is no gap for the Secretary to fill and he does not have the authority to add a "major purpose" requirement, even in an attempt to codify judicial precedent.
- Rules 7.2 and 1.10 (political organization) are invalid. Specifically, the Secretary's addition in Rule 7.2 of a requirement that a section 527 entity must have a "major purpose" of

[11] 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.

influencing Colorado elections contradicts the clear and unambiguous language of section 1-45-103 (4.5), C.R.S. This statute does not look to the purpose of the entity but the actual activities of the entity. And, the Secretary's addition in Rule 1.10 of an "express advocacy" requirement also contradicts the clear and unambiguous language of the statute. These rules contradict the clear and unambiguous language of the statutes by eliminating the statutory distinction between a political organization and a political committee.

- Rule 1.18 (showing of good cause for reduction of penalty) is invalid. Rule 1.18 merely eliminate penalties after a contribution is first disclosed and after Election Day regardless of a showing of good cause. Because the Rule does not fill a gap but applies irrespective of whether there is actually good cause to reduce or eliminate penalties, the rule is manifestly contrary to Article XXVIII of the state constitution.
- Finally, the District Court erred in not invalidating Rule 1.7 because this rule contravenes the clear and unambiguous definition of "electioneering communication" found in section 2 (7) (a) of Article XXVIII of the state constitution. The plain language of Rule 1.7 restricts the type of communication that would fall in the category of "electioneering communication" because it adds a "functional equivalence" test. Rule 1.7 is invalid because the constitutional provisions are clear and unambiguous that all communication unambiguously referring to a candidate is electioneering communication, leaving no gap for the Secretary to fill. Although the Secretary's attempt to conform section 2 (7) (a) of Article XXVIII of the state constitution to constitutional standards is understandable, it exceeds his authority to "administer and enforce" the law.

The Secretary had already announced that his office will not be enforcing the contested rules unless the District's Court's order is reversed on appeal.

It is not known at this time whether the Secretary will be seeking Supreme Court review of the order of the Court of Appeals.

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 RechtKornfield P.C. is representing the Paladino Plaintiffs. The Attorney General's office is representing the Secretary.

Staff member monitoring the case: Bob Lackner

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iv. *In Re: Interrogatory Propounded by Governor John Hickenlooper Concerning the Constitutionality of Certain Provisions of Article XXI, § 3 of the Constitution of the State of Colorado*, Colorado Supreme Court, Case Number 13-SA-214.

Subject: Whether the "prior participation requirement" of Article XXI, Section 3, of the Colorado Constitution (which requires an elector to vote on whether an officer subject to recall should be

recalled in order for the elector's vote for a successor candidate to count) comports with the First and Fourteenth Amendments to the United States Constitution.

Background/Issue:

In June 2013, citizens in Pueblo and El Paso Counties certified petitions to recall State Senator Angela Giron and State Senator John Morse. Governor John Hickenlooper set a September 10, 2013, recall election for both Senate seats. These recall elections were the first in Colorado's history for members of the General Assembly. On August 23, 2013, the Governor, pursuant to Article VI, Section 3, of the Colorado Constitution, submitted the following Interrogatory to the Colorado Supreme Court:

> "Colo. Const. art. XXI, § 3 requires an elector who wishes to vote for a successor candidate in a recall election to also cast a ballot on the recall issue. Is this requirement consistent with the First and Fourteenth Amendments to the United States Constitution?"

In determining whether to exercise its original jurisdiction on the question presented, the Court noted that Article VI, Section 3, of the Colorado Constitution declares that "[t]he supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor…". While the Court, historically, has declined to render opinions on matters such as pending legislation that, once enacted, might rise or fall on the merits of an individual controversy, or on individualized or speculative disputes between hypothetical private parties, the Governor's single question presented by the instant "solemn occasion" involved citizens' fundamental right to vote in a fast-approaching election. Given the state's clear interest in resolving this question, the Court concluded that it was required to answer the Interrogatory.

Turning to the question at hand, the "prior participation requirement" is stated thusly:

> **Section 3. Resignation - filling vacancy.** *** On such ballots, under each question, there shall also be printed the names of those persons who have been nominated as candidates to succeed the person sought to be recalled; **but no vote cast shall be counted for any candidate for such office, unless the voter also voted for or against the recall of such person sought to be recalled from said office**. The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office. **(Emphasis added)**

The Court first found that the prior participation requirement conflicts with voters' First Amendment associational rights by unconstitutionally compelling voters to speak on the recall question. The Court reasoned that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech", and that "[n]ecessarily, this protection extends to a citizen's decision to *not* speak… A citizen who wants to refrain from opining on the recall question, but who still wants to express an opinion about which successor candidate should be elected, is forced to

forfeit her vote entirely for that successor candidate." Because the First Amendment protects voters' right to refrain from speaking, and the prior participation requirement commands the opposite, that requirement is plainly unconstitutional.

With regard to the Fourteenth Amendment to the United States Constitution, the Court held that the prior participation requirement effectuates a severe limitation on citizens' fundamental right to vote by completely invalidating a voter's otherwise legal ballot for a successor candidate where that voter simply fails or chooses not to vote on the wholly distinct recall issue. The Court found that no compelling, or even rational, justification exists to nullify a voter's entire ballot simply because he or she refrains from answering the initial recall question. The Court held:

> In this case, the State's prior participation requirement unconstitutionally compels voters to express a view on the question of whether to recall an elected official. The voter must espouse a position even if she categorically opposes the recall mechanism, or, more benignly, has no opinion on whether a candidate should be recalled. Accordingly, though the extraordinary procedural posture of this case does not allow a fuller 'weighing' of the State's interests, the United States Supreme Court's precedent (and common sense) make clear that virtually no regulation that compels voters to take a position can pass constitutional muster.

Dissent: Justice Marquez, joined by Justice Coats, dissented in the case on the grounds that the Court erred in accepting the Interrogatory and that, given the "hypothetical nature" of the dispute, "no legitimate basis" exists to justify the prior participation requirement.

Counsel of Record: The following persons submitted briefs in this matter: the Secretary of State (represented by the Attorney General's Office); the Libertarian Party of Colorado and Gordon Roy Butt (represented by Matthew C. Ferguson of The Matthew C. Ferguson Law Firm, P.C.); and Senator John Morse, Senator Angela Giron, and the Colorado Democratic Party (represented by RechtKornfield P.C.).

Status: With the decision of the Colorado Supreme Court, the case is concluded.

Staff member monitoring the case: Kate Meyer

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v. *Independence Inst. v. Gessler*, United States District Court for the District of Colorado, Civil Action Number 10-CV-00609-PAB-MEH

Subject: Whether Colorado's statutory limitation on per-signature compensation for petition circulators (enacted pursuant to House Bill 09-1326) is constitutional in light of the First Amendment to the United States Constitution.

Background/Issue:

In 2009, the Colorado General Assembly passed House Bill 09-1326 ("HB 1326"), which, according to its title, concerned "the integrity of the statewide citizen-initiated petition process". The bill made various changes to ballot initiative and referendum processes. On May 15, 2009, the governor signed the bill into law.

The Plaintiffs (persons, organizations, and petition circulators involved in the initiative and referendum process in Colorado) initiated this action in the United States District Court for the District of Colorado on March 16, 2010, asserting that certain provisions of H.B. 1326 were unconstitutional. Specifically, the Plaintiffs asserted nine claims alleging violations of the First Amendment's protection of the exercise of free speech and one claim alleging both a violation of free speech and a violation of the due process clause of the Fourteenth Amendment.

On April 26, 2012, the Court granted the motion of the Defendant Secretary of State (the "Secretary") for summary judgment on Plaintiffs' second, third, fourth, eighth, ninth, and tenth claims for relief. Plaintiffs' sixth and seventh claims for relief were dismissed as moot and the Secretary stipulated to the entry of final judgment on Plaintiffs' first claim for relief. The trial to the court addressed Plaintiffs' only remaining claim — the fifth claim for relief, which challenges the constitutionality of Colorado's so-called "hybrid compensation scheme" for its petition signature-gathering process.

The hybrid compensation scheme codified at section 1-40-112(4), Colorado Revised Statutes, states as follows: "It shall be unlawful for any person to pay a circulator more than twenty percent of his or her compensation for circulating petitions on a per signature or petition section basis." The Court noted that the statute does not restrict all compensation to circulators on a per-signature basis; however, as a practical matter, the twenty percent restriction limits per-signature compensation to bonuses or incentive payments. As a result, the statute requires that circulators receive the majority of their compensation in the form of hourly payments.

The findings of fact set forth by United States District Judge Philip A. Brimmer included the following:

- The hybrid compensation scheme would significantly increase the costs of a signature-gathering campaign (as petition entities will not attract "itinerant professionals" and will thus not benefit from the lower training cost and higher productivity associated with them, but will incur greater costs to compensate unproductive circulators);
- The cost increase associated with section 1-40-112(4), Colorado Revised Statutes, is likely to lower the chances of underfunded proponents succeeding in the initiative and referendum process; and

- The various petition signature compensation schemes (hourly, per-signature, hybrid) have no measurable impact on validity rates. The evidence at trial of actual fraud was minimal and the evidence established that fraud occurs under both pay-per-hour and pay-per-signature systems because some individuals are simply prone to commit fraud.

After setting forth these findings, the Court turned to its legal analysis. When Plaintiffs make a First Amendment challenge to a state law that regulates the election process, the court must first consider the "character and magnitude" of the burden the State's regulation imposes on Plaintiffs' First Amendment rights, and then weigh this burden against the precise interests the State contends justify the burden. Regulations imposing severe burdens on Plaintiffs' rights are subject to strict scrutiny and must be narrowly tailored to advance a compelling State interest, while regulations that impose lesser burdens trigger less exacting review.

Turning to section 1-40-112(4), Colorado Revised Statutes, the Court stated that petition circulation is "core political speech" and that, by raising the cost of signature-gathering activities, the law would have the "inevitable effect of reducing the total quantum of speech on a public issue". Therefore, the Court applied strict scrutiny analysis. While the Court found that Colorado has a compelling interest in ensuring the reliability and honesty of the referendum and initiative process, the statute (in light of both the lack of evidence that the hybrid compensation scheme would actually redress petition fraud and the existence of less burdensome tools at the legislature's disposal) was deemed not to be narrowly (or even reasonably) tailored.

Having found that section 1-40-112(4), Colorado Revised Statutes, was an unconstitutional infringement of Plaintiffs' First Amendment rights, the Court then held that the Plaintiffs met their burden of showing that they are entitled to a permanent injunction of the enforcement of that law and any ancillary statute that enforced it (specifically sections 1-40-135 and 1-40-121, Colorado Revised Statutes), to the extent that those sections apply to the restriction on per-signature compensation.

Thus, after three years of litigation, including numerous motions, hearings, objections, and an eight-day bench trial, Judge Brimmer entered judgment in favor of Plaintiffs on their First and Fifth claims for relief and enjoined the enforcement of subsections (1) and (4) of section 1-14-112, Colorado Revised Statutes, and the ancillary statutes.

Status:

Defendant Secretary elected to forego an appeal.

In pursuit of their "prevailing party" fees under 42 U.S.C. § 1988, the Plaintiffs sought discovery of the Defendant's billing records. The Defendant challenged the relevancy of the government's billing records. On June 11, 2013, United States Magistrate Judge Michael E. Hegarty granted in part and denied in part Defendant Secretary of State's Second Motion for Protective Order.

Counsel of record: The Defendant Secretary of State is represented by the Attorney General's Office. Plaintiffs The Independence Institute, Jon Caldara, Dennis Polhill, Mason Tvert, Russell Haas, Douglas Campbell, and Louis Schroeder are represented by David Arthur Lane and Lisa Sahli of Killmer, Lane & Newman, LLP, Denver, CO.

Staff member monitoring the case: Kate Meyer

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c. Ethics

i. ***Gessler v. Grossman***, Denver District Court, Case Number 2013-CV-030421

Subject: Judicial review of final action taken by the Independent Ethics Commission ("IEC") against Secretary of State Scott Gessler (the "Secretary") consisting of findings that he had engaged in official misconduct and the imposition of civil penalties against him.

Background/Issue:

On October 15, 2012, Colorado Ethics Watch ("CEW") filed a complaint with the IEC alleging that Secretary of State Scott Gessler (the "Secretary") may have committed a felony and 2 misdemeanors relating to the use of public funds by expending $1,818.89 in state funds (specifically, $1,319.89 in discretionary funds and $422.00 in funds of the Department of State) to participate in an election law conference held in Florida. The complaint specifically alleged the Secretary had misused moneys from 2 separate and distinct funds: The Secretary's discretionary fund and the Department of State cash fund.

The IEC met on November 5, 2012, asserted jurisdiction over the complaint, and ordered the Secretary to respond to it. Subsequently, the IEC reviewed the complaint and deemed it non-frivolous. On November 8, 2012, the IEC served the Secretary with the full complaint. On December 20, 2012, the Secretary answered the complaint of CEW denying all wrongdoing. In his answer, the Secretary specified the manner in which he used the $1,818.89, divided among the discretionary funds and department funds that he used.

The same day he answered the complaint, the Secretary also separately filed a motion to dismiss, asserting that the IEC lacked jurisdiction over: (a) allegations that do not concern violations of the gift or lobbying bans under Amendment 41; or (b) criminal allegations. To the extent that CEW was not making criminal allegations, the Secretary also asserted the legal allegations against him were vague and undefined.

At a January 7, 2013, hearing, the IEC denied the Secretary's motion to dismiss.

On January 23, 2013, the IEC issued a written order concluding that dismissal of the complaint was unwarranted. The IEC concluded that the Complaint had alleged sufficient facts warranting an investigation of a potential violation of the Constitution or other standards of conduct or reporting requirements as reported by law.

Subsequently, the Secretary unsuccessfully moved to obtain discovery, to recuse two members of the IEC, and to refer the matter to an Administrative Law Judge.

On April 30, 2013, the IEC listed five different civil statutes and five different state fiscal rules that may apply as legal standards in the case.

On May 20, 2013, the Secretary repaid $1,278.90 to avoid even an appearance of impropriety.

A one-day hearing on the matter was held on June 7, 2013. On June 19, 2013, the IEC issued a written order finding, among other things, that:

- The Secretary spent $1,278.90 of his discretionary account primarily for partisan, and therefore personal, purposes, to fly to Florida to attend a seminar and continuing legal education program sponsored by the Republican National Lawyers and thereafter attend a meeting of the Republican National Committee. By using moneys from his discretionary account for other than official business, the Secretary violated the ethical standard of conduct contained in section 24-9-105, C.R.S. (use of discretionary funds) and, accordingly, breached the public trust for private gain in violation of section 24-18-103 (1), C.R.S.
- The Secretary's acceptance of reimbursement of the balance of the discretionary account without any documentation or detail of expenses incurred, violated the ethical standard of conduct contained in section 24-9-105, C.R.S., in that the reimbursement was not in pursuance of official business but was personal in nature. By so doing, the Secretary breached the public trust for private gain in violation of section 24-18-103 (1), C.R.S.
- The Secretary's acceptance of reimbursement from state funds for travel expenses incurred as a result of his early return to Denver in the wake of threats to him and his family does not violate any ethical standard of conduct as provided by law. The necessity of the early return to Denver was directly related to the Secretary's official position. To the extent that the payment for the hotel stay was paid out of campaign funds, any such reimbursement would be for personal purpose and not for official business.

The IEC penalized the Secretary by ordering him to pay back $1,396.89. The IEC then doubled the penalties for a total of $2,793.78, which was reduced to $1,514.88, a number reflecting credit for the $1,278.90 that had already been repaid by the Secretary.

On July 2, 2013, the Secretary filed an appeal with the District Court for the City and County of Denver under section 24-18.5-101 (9), C.R.S., seeking judicial review of the final action of the IEC. The appeal names as Defendants the individual commissioners of the IEC and the Commission itself (collectively referred to as the "IEC Defendants").

In the opening brief of his appeal, which he filed on November 12, 2013, the Secretary asks the Court to set aside the IEC's order and the sanctions imposed against him on the basis of the following arguments:

- The IEC exceeded its jurisdiction, which is limited to gifts given for the purpose of influencing a public official;
- Regardless of the IEC's overarching jurisdiction, the Secretary's expenditures were proper;
- The IEC violated the Secretary's right to due process in several ways; and
- The IEC violated the Secretary's right to free speech and assembly by prohibited his official attendance at an accredited continuing legal education conference solely because a Republican organization sponsored the conference.

The Secretary seeks reversal of the IEC's order dated June 19, 2013, and a declaration that section 5 of article XXIX of the state constitution and section 24-18.5-101, C.R.S., are unconstitutional with respect to their references to "other standards of conduct".

Status:

The answer brief of the IEC Defendants is required to be filed with the Court on or before December 17, 2013.

Counsel of record: The Secretary is represented by David Lane of Killmer, Lane, & Newman, LLP; Robert Bryce of RJB Lawyer LLC; and Michael Davis of the Law office of Michael R. Davis, LLC. The IEC Defendants are represented by the Colorado Attorney General's office.

Staff members monitoring the case: Jennifer Gilroy and Bob Lackner

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d. **Interstate Commerce**

i. ***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. The 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, etc.) 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.

The 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, the 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 the 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 the 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.

The 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 the DOR, and costs and attorneys' fees.

Generally underlying its claims of federal and state constitutional violations, as summarized above, is the DMA's belief that the primary purpose of the Act and the DOR's implementing rules is not to allow the 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 the DMA's complaint on the grounds that: 1) The DMA lacks standing to bring the suit; and 2) The Court lacks subject matter jurisdiction over the DMA's state law claims on the grounds that: (i) The Eleventh Amendment to the United States Constitution bars the DMA's challenge to the Act; (ii) Section 1983 cannot be employed to assert violations of state law; 3) The 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) The 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, the DMA responded to Huber's motion to dismiss.

On August 13, 2010, the 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 the 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 the DOR from enforcing the Act and any regulations promulgated thereunder until further order of the Court.

On May 6, 2011, the DMA and 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.

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 the DOR from enforcing the specific provisions of the Act and regulations that are unconstitutional.

On June 25, 2012, the DOR (as Defendant/appellant) filed an opening brief in the United States 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. The DMA's answer brief was filed on July 30, 2012. Defendant's reply brief was filed on August 16, 2012. The Tenth Circuit heard oral argument on November 7, 2012.

On August 20, 2013, the Tenth Circuit panel decided the case on jurisdictional grounds, not substantive law, and ordered the federal district court to dismiss the DMA's Commerce Clause claims for lack of jurisdiction and to dissolve the permanent injunction entered against the DOR. The jurisdictional decision was based on a federal law, the Tax Injunction Act, 28 U.S.C. sec. 1341, that provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Tenth Circuit panel explained that "this broad language prohibits federal courts from interfering with state tax administration through injunctive relief, declaratory relief, or damage awards."

On September 18, 2013, the DMA petitioned the Tenth Circuit for an en banc rehearing which was denied.

On November 4, 2013, the DMA filed suit in Denver District Court seeking declaratory and injunctive relief. Based on the federal and state constitutional provisions outlined above, the Complaint sets forth the following claims for relief:

- Discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3;
- Improper regulation of interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3;
- Violation of the right of privacy of Colorado consumers guaranteed under the United States Constitution and the Colorado Constitution;
- Violation of the right of free speech of out-of-state retailers and of Colorado consumers guaranteed under the First and Fourteenth Amendments to the United States Constitution and the Colorado Constitution;
- Depriving out-of-state retailers of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution;
- The taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 15, of the Colorado Constitution; and
- A declaration that the penalty provisions of the act and regulations violate the United States and Colorado Constitutions and are unenforceable.

The DMA requests the Court:

- Declare the Act's notice and reporting obligations and penalty provisions, as set forth in section 39-21-112 (3.5), C.R.S., and all regulations promulgated pursuant thereto, to be unconstitutional;
- Enter an injunction enjoining enforcement by the DOR of the notice and reporting obligations of the Act and regulations;
- Enter an injunction enjoining enforcement by the DOR of the penalty provisions of the Act and regulations; and
- Award the DMA its costs.

The DOR's Answer to the Complaint was due on Friday, December 6, 2013.

Counsel of record: The DMA is represented by Greg Isaacson and Matthew Schaefer of Brann & Isaacson (Boston, MA). The DMA is also represented in the Denver District Court case by Adam W. Chase, Keith M. Edwards, and Emily M. Nation of Hutchinson Black & Cook (Boulder, CO). Ms. Huber is represented by the Attorney General's Office.

Staff member monitoring the case: Esther Van Mourik

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ii. ***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 States 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.

Currently pending before the court are the Defendant's motions for summary judgment concerning Claims 1 and 2 and the standing of Plaintiff Lueck. On December 2, 2013, a minute order was granted amending the case caption; it appears that the Energy & Environment Legal Institute has been substituted for Plaintiffs ATI and ATP, although the caption remains unchanged as of December 9, 2013.

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. The Attorney General's office is representing the state Defendants.

Staff member monitoring the case: Duane Gall

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e. Medical Marijuana

i. *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 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 individuals, filed a lawsuit in Denver District Court alleging that all or part of the Medical Marijuana Legislation (the "Legislation") is unconstitutional. Plaintiffs' original complaint named the General Assembly as one of the Defendants. But, Plaintiffs filed an amended complaint on July 29, 2011, naming as Defendants, besides the state, Governor Hickenlooper, Barbara Brohl, executive director of the Department of Revenue and Martha Rudolph, executive director of the Department Public Health and Environment. The amended complaint also removed the General Assembly as a Defendant.

The complaint alleges that section 14 of article XVIII of the Colorado Constitution guarantees patients with a debilitating medical condition diagnosis the constitutional right to use marijuana for medical purposes. Plaintiffs claim that: 1) The Legislation and regulations interfere with the constitutionally secured rights of qualifying patients and their primary caregivers to the medication; 2) The Legislation restrains access to medication by empowering local authorities to prohibit marijuana businesses; 3) The Legislation conflicts with Colorado Constitutional confidentiality, privacy, and property protections; and 4) The Legislation inflicts severe harm upon qualifying medical marijuana patients by effectively depriving them of ready access to medication as envisioned by the Colorado Constitution. 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 are requesting a declaration that certain statutory provisions and regulations be declared unconstitutional as they pertain to qualifying medical marijuana patients and to their caregivers. Plaintiffs additionally request a preliminary or permanent order barring Defendants from implementing or enforcing the 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 see if the Colorado Supreme Court would grant certiorari in the case of *Beinor v. Industrial Claims Appeals Office*, since the parties 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. On December 27, 2012, the parties filed a joint motion to dismiss without prejudice stating that, with the passage of Amendment 64 and ongoing changes in the medical marijuana industry, it was appropriate to stop litigating this matter at this time. The court granted the dismissal on January 28, 2013.

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 member monitoring the case: Michael Dohr

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f. PERA

i. ***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 granted and denied in part the Defendant's motion to dismiss. The motion to dismiss was denied as to the claims that Senate Bill 10-001 violated the takings and due process clauses of the United States Constitution and as to the claims that

the individual Defendants in their official capacities violated the contract, takings, and due process clauses of the United States Constitution. The motion to dismiss was granted as to the request for monetary damages in connection with the claims against the individual Defendants in their official capacities.

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.[12] 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.[13] 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*.

On October 13th, 2012, the Colorado Court of Appeals reversed the District Court's grant of summary judgment, holding that the Plaintiffs did have a contractual right to have their retirement benefits calculated using the COLA formula in effect when they retired. But the Court did not grant the Plaintiffs' summary judgment on their Contract Clause claim. Instead the Court of Appeals remanded the case, instructing the District Court to determine whether or

[12] 54 P.3d 849 (2002).

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

not the changes to the COLA in Senate Bill 10-001 substantially impaired the Plaintiffs' contractual rights or were reasonable and necessary to serve a legitimate public purpose.

At the end of November, 2012, both the Plaintiffs and the PERA Defendants appealed the Colorado Court of Appeals decision to the Colorado Supreme Court. On August 5, 2013, the Colorado Supreme Court granted the Petition and Cross-Petition for Writ of Certiorari on the following issues: 1) Whether the contracts clause framework articulated in *In re: Estate of DeWitt* (54 P.3d 849 (Colo. 2002)) applies to all contract clause claims under the Colorado Constitution; 2) Whether Colorado PERA members have contractual rights to the COLA adjustment formulas in place at their respective retirements for life without change; and 3) Whether SB10-001, which adjusted COLA adjustments to their current level of two percent compounded annually, was constitutional because it: (a) did not substantially impair contractual expectations and was reasonably necessary to ensure the pension fund's long-term viability, and (b) was not a regulatory taking.

The Plaintiffs filed their opening brief on October 24, 2013, and the answer briefs from the PERA Defendants are due in mid-December, 2013.

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 RechtKornfield, P.C. 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

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ii. ***Walker Stapleton v. PERA*, Denver District Court, Case Number 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;[14] 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.

[14] 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."

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 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 a determination of a Question 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.

In August, 2013, the Colorado Court of Appeals upheld the District Court's ruling that the Treasurer is not entitled to unfettered access to PERA records. The court stated that, while a trustee may need access to PERA records to fulfill his or her statutory duties, such access is guided by the statutory requirements that it be: (1) solely in the interest of the members and benefit recipients; and (2) for the exclusive purpose of providing benefits and defraying reasonable expenses incurred in performing such duties as required by law.

The Court of Appeals also upheld the District Court's ruling that the PERA board of trustees may unilaterally place conditions on compliance with a co-trustee's request for information, and refuse to provide the information requested unless and until those conditions are satisfied. The Court stated that the PERA board's response to a co-trustee's request for information is subject to either the statutory duty of loyalty or the common law duty of loyalty to the beneficiaries of the trust, and therefore, the board may unilaterally place conditions on its compliance with a co-trustee's request for information and refuse to provide the information requested unless and until those conditions are satisfied, if the actions comport with the trustees' applicable duty of loyalty.

The Court of Appeals stated that nothing in its opinion is intended to prevent the Treasurer from seeking access to PERA member and beneficiary information in the future. However, as the proponent of such request, the Treasurer bears the burden of establishing that his request is consistent with a fiduciary purpose and would not impose an unreasonable expense on PERA.
On November 12, 2013, the Treasurer filed a Petition for a Writ of Certiorari with the Colorado Supreme Court to appeal the Court of Appeals ruling to uphold the District Court decision. Governor Hickenlooper filed an amicus brief with the Colorado Supreme Court in support of the Treasurer's petition. PERA's response was due at the beginning of December. The Supreme Court has not yet announced whether it will grant the Treasurer's petition.

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 member monitoring the case: Gregg Fraser

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g. Second Amendment Issues

i. ***John B. Cooke, Sheriff of Weld County, Colorado, et al. v. Governor John W. Hickenlooper*, United States District Court for the District of Colorado, Civil Action Number 13-CV-01300-MSK-MJW**

Subject: Constitutionality of House Bill 13-1224 (prohibiting large-capacity ammunition magazines) and House Bill 13-1229 (requiring background checks for private transfers of firearms).

Background/Issue:

On March 20, 2013, Governor Hickenlooper signed into law House Bills 13-1224 (HB 1224) and 13-1229 (HB 1229). At that time, the Governor instructed "the Colorado Department of Public Safety to consult with the Office of the Attorney General and others, as necessary . . . and then to draft and issue, to law enforcement agencies in the state of Colorado, technical guidance on how the law should be interpreted and enforced."

Per the Governor's request, on May 16, 2013, Attorney General (AG) John Suthers issued a memorandum to James H. Davis, executive director of the Colorado Department of Public Safety,

entitled "Technical Guidance on the Interpretation and Application of House Bill 13-1224, Large-Capacity Magazine Ban". The AG's memorandum stated, in pertinent part:

> The phrase "designed to be readily converted to accept more than fifteen rounds of ammunition" has prompted questions regarding the scope of the definition, particularly because some ammunition magazines include features, such as removable baseplates, that can be removed and replaced or otherwise altered so that the magazine accepts more than fifteen rounds.
>
> The term "designed," when used as a modifier, denotes a feature that meets a specific function. This suggests that design features that fulfill more than one function, and whose function is not specifically to increase the capacity of a magazine, do not fall under the definition. The features of a magazine must be judged objectively to determine whether they were "designed to be readily converted to accept more than fifteen rounds."
>
> Under this reading of the definition, a magazine that accepts fifteen or fewer rounds is not a "large-capacity magazine" simply because it includes a removable baseplate . . .".

The AG's Technical Guidance memo also addresses the meaning of "continuous possession" for the purposes of the grandfather-clause exception in HB 1224:

> ". . . Responsible maintenance, handling, and gun safety practices, as well as constitutional principles, dictate that these provisions cannot be reasonably construed as barring the temporary transfer of a large-capacity magazine by an individual who remains in the continual presence of the temporary transferee . . . . For similar reasons, the bill's requirement that an owner must maintain 'continuous possession' in order to ensure the application of the grandfather clause cannot reasonably be read to require continuous physical possession."

On May 17, 2013, Plaintiffs, including 54 of the 64 county sheriffs of Colorado, filed suit in federal district court stating the following six claims for relief:

1. HB 1224's prohibition on all magazines with a capacity of 15 rounds or more is an unconstitutional infringement on the right of citizens to possess certain firearms and firearm accessories that are commonly used for lawful purposes.

2. Included in HB 1224's definition of "large-capacity magazines" are magazines of any size that are "designed to be readily converted" to hold more than 15 rounds. This language effectively bans most magazines -- regardless of capacity -- because most ammunition magazines contain removable floor plates or end caps, which permit a user to attach multiple such magazines to a firearm at once. This prohibition violates the Second and Fourteenth Amendments of the U.S. Constitution.

3. HB 1224 is unconstitutionally vague in violation of the Fourteenth Amendment. Plaintiffs cannot determine whether a magazine with a removable floor plate or end cap was "designed to be readily converted" to hold more than 15 rounds.

4. HB 1224's requirement for "continuous possession" of a large-capacity magazine that a person possesses on the effective date of the act is undefined and vague in violation of the Second and Fourteenth Amendments.

5. HB 1224 discriminates against disabled individuals in violation of Title II of the Americans with Disabilities Act of 1990 because disabled individuals have less ability to defend themselves than do able-bodied persons. Specifically, they are unable to change magazines as quickly, and they are unable to retreat to positions of safety where a magazine might be changed. Similarly, HB 1229's restrictions on temporary transfers unconstitutionally restrains persons with disabilities from engaging in conduct that is essential to the exercise of their Second Amendment rights.

6. HB 1229's requirement that private individuals secure criminal background checks for every common, noncommercial, permanent, or temporary transfer of a firearm is an unlawful infringement upon the Second Amendment right to bear arms. Because federal firearms licensees will be reluctant to perform background requests for private transferors under the conditions described in the bill, the bill amounts to a prohibition, rather than a regulation, of many common private sales and temporary transfers.

The Plaintiffs requested from the court a declaratory judgment stating the foregoing claims and enjoining the Governor and his agents from enforcing the provisions of the acts. The AG, acting as counsel on behalf of the Governor, filed an answer to the complaint on June 7, 2013.

Status:

Since the filing of the Governor's answer to the initial complaint, the case has consisted of arguments concerning several motions, which have been filed in the following order:

- Governor's motion for Certification of Questions of Law to the Colorado Supreme Court.
- Plaintiffs' motion for a temporary restraining order and preliminary injunction.
- Governor's motion to dismiss Plaintiffs' claims 2, 3, and 4, and to dismiss the sheriffs as Plaintiffs acting in their official capacity.
- Governor's motion for a protective order barring the Plaintiffs from requiring the Governor to sit for a deposition.

Governor's motion for Certification of Questions of Law to the Colorado Supreme Court. On June 10, 2013, the Governor filed a motion with the district court for certification of two questions of law pertaining to claims 2, 3, and 4 of the Plaintiffs' complaint. (Under the certification process, the district court requests guidance from the Colorado Supreme Court as to the scope and meaning of the challenged provisions as a matter of state law. *See* Rule 21.1 of the Colorado Appellate Rules.)

The two questions posed by the Governor were:

1. Does HB 1224's definition of "large-capacity magazine" amount to a ban on functional magazines for most handguns and many rifles, or does it apply only to magazines that are principally used with extensions or devices that increase the combined capacity to more than 15 rounds?

2. Does the grandfather clause in HB 1224, which applies when an owner "maintains continuous possession" of a large-capacity magazine after July 1, 2013, apply when the owner allows another person to temporarily hold, use, or share the magazine for lawful purposes?

On June 14, the Plaintiffs filed their response, in which they objected to the Governor's motion. On August 22, the court denied the Governor's motion.

Plaintiffs' motion for a temporary restraining order and preliminary injunction. On June 12, 2013, Plaintiffs moved for a temporary restraining order and preliminary injunction to enjoin the Governor from enforcing the challenged provisions of HB 1224 and HB 1229. The Governor filed a brief in opposition to this motion on June 24.

At a July 10 hearing before the district court, the Plaintiffs eventually withdrew their motion. Shortly thereafter, the AG's office issued a second memo offering "additional technical guidance" concerning limitations on the enforcement of HB 1224 and HB 1229.

Governor's motion to dismiss Plaintiffs' claims 2, 3, and 4, and to dismiss the sheriffs as Plaintiffs acting in their official capacity. On August 1, 2013, the Governor moved to dismiss three of the sheriffs' claims and to dismiss the sheriffs as Plaintiffs acting in their official capacity. The Plaintiffs filed their response to the Governor's motion on August 22.

On November 27, 2013, the court granted the Governor's motion with respect to the Plaintiffs' claim that the phrase "designed to be readily converted" is unconstitutionally vague, and this claim (claim #3, described above) was dismissed. The court also granted the Governor's motion to dismiss the sheriffs as Plaintiffs acting in their official capacity and granted the sheriffs 14 days to join the suit in their individual capacities.

Governor's motion for a protective order barring the Plaintiffs from requiring the Governor to sit for a deposition. On September 19, the Plaintiffs served a notice of deposition upon Governor Hickenlooper. On September 25, the AG filed a motion for a protective order barring the Plaintiffs from requiring the Governor to sit for a deposition.

On October 28, U.S. District Court Magistrate Judge Michael J. Watanabe granted the AG's motion and issued the protective order.

Counsel of record: David B. Kopel of the Independence Institute representing the sheriffs and David Strumillo; Jonathan M. Anderson of Holland & Hart representing Magpul Industries and the National Shooting Sports Foundation; Richard A. Westfall and Peter J. Krumholz of Hale Westfall LLP representing Disabled Citizens, Outdoor Buddies, Inc., Colorado Outfitters Association, Colorado Farm Bureau, and Women for Concealed Carry; Marc F. Colin of Bruno Colin Jewell & Lowe PC representing licensed firearms dealers; Anthony J. Fabian representing Colorado State Shooting Association and Hamilton Family Enterprises, Inc. d/b/a Family Shooting Center at Cherry Creek State Park. The Attorney General's Office is representing the Governor.

Staff member monitoring this case: Richard Sweetman

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ii. ***Rocky Mountain Gun Owners, et al. v. Governor John W. Hickenlooper*, District Court, City and County of Denver, Civil Action Number 13-CV-33879**

Subject: Constitutionality of House Bill 13-1224 (prohibiting large-capacity ammunition magazines) and House Bill 13-1229 (requiring background checks for private transfers of firearms).

Background/Issue:

On March 20, 2013, Governor Hickenlooper signed into law House Bills 13-1224 (HB 1224) and 13-1229 (HB 1229). On September 4, 2013, Plaintiffs filed suit in Denver district court stating the following four claims for relief:

1. HB 1229's requirement that a background check of a transferee must be conducted before the transfer of a firearm between private parties violates the due process and equal protection provisions of article II, section 25 of the Colorado Constitution.

2. HB 1229 unconstitutionally vests executive and legislative powers in licensed firearms dealers in violation of the Colorado Constitution.

3. HB 1229 violates article II, section 13 of the Colorado Constitution (i.e., the right to bear arms).

4. HB 1224 violates article II, section 13 of the Colorado Constitution (i.e., the right to bear arms).

The Plaintiffs requested from the court a declaratory judgment stating the foregoing claims and enjoining the Governor and his agents from enforcing the provisions of the acts. The Plaintiffs also requested that the court award attorneys' fees and costs.

Status:

On November 4, 2013, the Governor filed a motion to dismiss the Plaintiffs' complaint. The Governor's motion asserts that the Plaintiffs have not established that they have suffered an injury-in-fact, and therefore they lack standing to pursue their claims. The Governor also argues that the Plaintiffs have failed to state a claim for which relief may be granted by the court.

On November 21, 2013, the Plaintiffs filed a motion for an extension of time in which to respond to the Governor's motion to dismiss. The Plaintiffs' motion was unopposed by the Governor, and the court granted the motion on November 26, 2013. In its order granting the motion, the court stated that the Plaintiffs' response is due on December 13, and any reply by the Governor to such response is due on December 20.

Counsel of record: Representing the Plaintiffs: Barry K. Arrington. Of counsel: William J. Olson, Herbert W. Titus, Robert J. Olson.

The Attorney General's Office is representing the Governor.

Staff member monitoring this case: Richard Sweetman

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h. TABOR

i. *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)[15].

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 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

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

directors of the Enterprise. The Foundation alleged 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 alleged to be both a tax and a tax policy change resulting in a net tax revenue gain to the Bridge Enterprise and CDOT, and by issuing revenue bonds without prior voter approval. The Foundation further alleged that the reasons why the Enterprise is not a TABOR enterprise are that 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 that the bridge safety surcharge is a tax, which an enterprise may not impose, rather than a fee.

The Foundation requested 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 Foundation's complaint. Defendants denied: (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 the Bridge Enterprise received more than ten percent of its revenues in grants from the state; and (5) That the Foundation was entitled to any of the legal relief it sought.

Defendants asserted as affirmative defenses that: (1) The complaint failed to state a claim upon which relief could 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) barred the action; (3) Defendants performed all actions required by the Colorado Constitution and Colorado statutes; (4) The Foundation lacked standing to bring the action; (5) The Foundation's allegations and causes of action were uncertain; and (6) Declaratory relief, even if granted, would not afford the Foundation present relief from the acts that it complained of.

Defendants requested 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.

On February 11, 2013, after conducting discovery, the Foundation filed a motion for summary judgment, alleging that: (1) The Bridge Enterprise is not a TABOR enterprise because it does not function as a self-supporting business that engages in market exchanges but instead levies "a general tax called the bridge safety surcharge" and because in fiscal year 2011 it received more than ten percent of its revenue from state grants in the form of a combination of federal grants that CDOT

passed on to the Bridge Enterprise and 56 bridges that CDOT transferred to the Bridge Enterprise; and (2) Because the Bridge enterprise is not a TABOR enterprise, TABOR required it to obtain voter approval before it could impose the bridge safety surcharge or issue revenue bonds.

On April 1, 2013, Defendants filed a joint response to the Foundation's motion for summary judgment, responding that: (1) The existence of disputed issues of material fact precluded a grant of summary judgment to the Foundation; (2) The Foundation had failed to meet its legal burden of proving the portions of FASTER that it was challenging unconstitutional beyond a reasonable doubt; (3) The bridge safety surcharge is a fee, not a tax; and (4) The Bridge Enterprise is a TABOR enterprise because an entity may fulfill a role typically associated with government, such as bridge reconstruction, and still be a government-owned business and because the Bridge Enterprise did not actually receive more than ten percent of its revenues from state grants.

On April 8, 2013, the Foundation filed a reply in support of its motion for summary judgment that generally reiterated its original allegations and alleged that there were no disputed issues of material fact. The court did not grant the Foundation's motion for summary judgment.

On May 13 and 14, 2013, the court conducted a two-day trial. On July 19, 2013, the court issued written findings of fact and conclusions of law that denied all of the Foundation's claims for relief and constituted a final judgment in favor of Defendants. Specifically, the court found that: (1) The bridge safety surcharge is a fee, not a tax, because it is credited to a dedicated account when collected and used for the sole purpose of bridge maintenance and replacement and the law does not require a nexus between an individual's use and the permissibility of a user fee; (2) The Bridge Enterprise did not receive over ten percent of its revenue in grants because neither federal moneys nor items that are not money are grants for purposes of TABOR; and (3) The Bridge Enterprise is a TABOR enterprise that was not subject to TABOR voter approval requirements when it imposed the bridge safety surcharge and issued revenue bonds.

On September 16, 2013, the Foundation filed an appeal with the Colorado Court of Appeals.

Status:

The case is pending before the Colorado Court of Appeals. The Court has not yet established a briefing schedule for the parties.

Counsel of record: James Manley and Steven Lechner of the Mountain States Legal Foundation represent the TABOR Foundation. Megan Rundlet and Robert Huss of the Attorney General's Office represent the Bridge Enterprise. Mark Grueskin of RechtKornfield P.C. represents the Commission and the members of the Commission.

Staff member monitoring this case: Jason Gelender

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ii. ***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/Issue:

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 Court is considering the parties' cross motions for summary judgment.

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

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iii. ***TABOR Foundation v. Regional Transportation District, et al.,* Denver District, Case Number 2013-CV-31974**

Subject: May a special district's sales and use tax exemption be eliminated without prior voter approval under section 20 of article X of the Colorado Constitution ("TABOR")?

Background/Issue:

The regional transportation district ("RTD") and the scientific and cultural facilities district ("SCFD") are authorized by law to levy an excise tax on all tangible personal property sold or used in the districts, unless there is a statutory exemption from the tax. While the districts' sales and use

tax is based on the state sales and use tax, there are currently some items that are exempt from the state tax that are subject to the districts' tax, and vice versa. For example, RTD and SCFD may tax the sales of low emitting motor vehicles, but the state may not. The state may tax the sale of candy and soft drinks, but RTD and SCFD may not.

This past session, the General Assembly enacted House Bill 13-1272, which eliminated some of the districts' exemptions and created other new exemptions for them so that, starting January 1, 2014, the districts' and state's exemptions will be identical.

On October 23, 2013, the TABOR Foundation filed a lawsuit in Jefferson County District Court against RTD, SCFD, the directors of the districts, the Colorado Department of Revenue, and the Executive Director of the Department. The foundation alleges that HB13-1272 creates a new tax on the items that were previously exempted – candy, soft drinks, cigarettes, direct mail advertising materials, and food containers – and that this new tax is unconstitutional because the districts did not receive prior voter approval for it as required by TABOR. The foundation requests that the Court declare that the taxes collected pursuant to HB13-1272 are unconstitutional, enjoin the districts and the department of revenue from collecting the tax, and award them their attorney fees and costs. The foundation also filed a motion for a preliminary injunction to stop the districts from beginning to collect sales and use tax on these items.

Status:

On November 21, 2013, the Jefferson County District Court granted the Defendants' Joint Motion for Change of Venue pursuant C.R.C.P. 98 (f) (1) and transferred venue to the District Court for the City and County of Denver. The case had not been docketed in the Denver court as of December 3, 2013.

Counsel of record: The TABOR Foundation is represented by James M. Manley and Steven J. Lechner of the Mountain States Legal Foundation. The Defendants are represented as follows: The Attorney General's Office represents the Department of Revenue and Barbara Brohl, its Executive Director; Marla Lien represents RTD and its Directors; and Charles Norton of Norton & Smith, P.C., and Alan Pogue of Icenogle Seaver Pogue, P.C., represent the SCFD and its Directors.

Staff member monitoring the case: Ed DeCecco