SUMMARY OF LITIGATION AFFECTING THE COLORADO GENERAL ASSEMBLY AS OF DECEMBER 19, 2014

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.*, Colorado Supreme Court Case Number 11SC935.

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 Supreme Court granted the Representatives' petition for Writ of Certiorari on the issue of the term "prevailing applicant". Oral argument on the appeal was held on June 12, 2013.

By a 5-2 majority, the Colorado Supreme Court affirmed the judgment of the Court of Appeals.

The issue before the Supreme Court was a matter of statutory interpretation concerning the precise meaning of the term "prevailing applicant" as used in the statute. The Court concluded that, on its face, the term "prevailing" could reasonably be understood to describe an applicant who has achieved a court order requiring the custodian to permit inspection of the record he seeks or it could be understood to intend a further limitation of the recovery of a fee award, by narrowing the class of applicants entitled to such an award to those prevailing in the litigation as a whole.

The Supreme Court found that limiting "applicant" to prevailing applicant not only clarifies or makes express what would otherwise be merely implicit—that an applicant who achieves the right of inspection is a prevailing applicant—but actually provides direction concerning the costs and fees to which he is entitled. While the statutory provision mandates an award, it leaves to the district court the determination of the amount of the award. *See* section 24-72-204 (5). The award to the prevailing

applicant" should include no more than the costs and attorney fees incurred with regard to the records as to which he has actually succeeded in gaining access, rather than his costs and attorney fees in prosecuting the action as a whole.

For this very reason, although the statute prohibits the district court from denying the applicant an award of costs and attorney fees "[u]nless the court finds that the denial of the right of inspection was proper," it does not deprive the court of discretion with regard to the amount of the fee. While affirming the Court of Appeal's decision, the Supreme Court did hold that, because a partially successful application to the district court will necessarily require the apportionment of costs and fees among the applicant's successful and unsuccessful efforts, more than a mere accounting is necessarily implicit in the statute's direction for the court to determine the amount of the award.

Because the statutory section at issue, section 24-72-204 (5), C.R.S., when properly construed, mandates an award of costs and attorney fees in favor of any person who applies for and receives an order from the district court requiring a person to permit inspection of a public record, as provided for by the statute, the Supreme Court affirmed the judgment of the Court of Appeals. On remand, the district court was ordered to exercise its discretion in determining the amount of costs and reasonable court attorney fees to which CRP, as prevailing applicant, is entitled in light of its partial success in the litigation.

A hearing on the amount of costs and attorney fees to which CRP was entitled based upon the proportion of constituent surveys that it successfully obtained was scheduled for November 10th before the district court. In an attempt to finally resolve this litigation, both parties agreed to nonbinding mediation which occurred on October 8, 2014. The parties reached an agreement in the mediation on a settlement amount the General Assembly would pay to settle all of CRP's claims. As a result of this agreement, the settlement amount was paid to CRP, the scheduled hearing was canceled, and an order dismissing this action with prejudice was granted by the district court on November 10, 2014. This case is concluded.

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 Denver District Court conducted a 9-day trial of this case in March, April, and May, 2014. Prior to trial, on February 19, 2014, the court determined that LVW's complaint asserted predominately equitable claims and granted the General Assembly's motion for a trial to the court, so there was no jury.

On August 21, 2014, the court issued its 34-page findings of fact, conclusions of law, and order in the case. The court held that LVW was not entitled to relief on any of its claims in the lawsuit because LVW failed to meet its burden of proof by a preponderance of the evidence. The court also held that the General Assembly was entitled to relief on its counterclaim. The court awarded the General Assembly damages in the amount of $33,619.35 plus interest. As allowed by law, on September 11, 2014, the General Assembly submitted a bill of costs to the court. Because LVW did not object to some of the costs requested by the General Assembly, the court awarded the General Assembly costs in the amount not objected to by LVW. The court set an evidentiary hearing for March 6, 2015 on the contested costs requested by the General Assembly.

LVW filed a notice of appeal. In this notice, LVW stated that it is appealing the trial court's granting of the General Assembly's motion for trial to the court rather than to a jury. Once the trial court files the record of the case with the Colorado Court of Appeals, the appellate court will establish a briefing schedule and timeline for when the case will be heard by a 3-judge panel of the Colorado Court of Appeals. The trial court will continue to have jurisdiction of the case for purposes of conducting the March 6, 2015, evidentiary hearing and entering any orders connected with the contested portions of the General Assembly's bill of costs.

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. ***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

[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.

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 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.

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

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

[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.

the Equal Protection Clause and dismissed that claim with prejudice. The Court further held that the political question doctrine does not bar Plaintiffs' Impermissible Amendment claim. Therefore, the Court allowed the action to proceed past the pleadings stage on all of Plaintiffs' claims except for the Equal Protection claim.

The Defendants subsequently sought an interlocutory appeal of the district court's order on the motion to dismiss with the Tenth Circuit Court of Appeals. The Tenth Circuit granted this request for an interlocutory appeal on September 24, 2012, 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. By order dated March 7, 2014, the Tenth Circuit Court of Appeals addressed only the standing and political question issues. It found that Plaintiffs possess standing to bring their claims concerning the alleged diminution of their legislative power. Because neither the standing requirements under Article III of the United States Constitution nor the asserted doctrine of prudential standing bars Plaintiffs' lawsuit, the Court of Appeals affirmed the district court's rulings on legislative standing. The Tenth Circuit also affirmed the district court's conclusion that the specific Guarantee Clause and Enabling Act claims at issue are not barred by the political question doctrine, or, the argument that the federal courts are barred from resolving this kind of dispute. By order dated July 22, 2014, a majority of all of the Tenth Circuit judges in active service voted to deny a request for rehearing en banc, or, by the entire panel of active judges on the court. Four judges dissented from that determination.

On or about October 17, 2014, Governor Hickenlooper filed a Petition for a Writ of Certiorari with the United States Supreme Court on the following questions:

1. Whether Plaintiffs' claims that Colorado's government is not republican in form remain non-justiciable political questions; and
2. Whether a majority of legislators have standing to challenge a law that allegedly dilutes their power to legislate on a particular subject.

On or about November 21, 2014, Plaintiffs' filed their Brief in Opposition to Petition For A Writ of Certiorari.

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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d. ***O'Connor v. Williams*, United States District Court for the District of Colorado, Case Number 14-CV-01298.**

Subject: Whether a state legislator who obtains a temporary protective order and seeks a permanent protective order against a self-described social activist who persistently but nonviolently confronts her at town hall meetings and at other times regarding her position on foreclosure-related issues and legislation violates the activist's constitutional right to freely engage in political speech without being retaliated against and is civilly liable under the federal civil rights statute, 42 U.S.C. §1983.

Background/Issue: Darren O'Connor (O'Connor) is a self-described "dedicated social activist" and a member of the Colorado Foreclosure Resistance Coalition (CFRC). During the 2013 legislative session, the CFRC supported the passage of HB13-1249 titled "Concerning residential foreclosures, and, in connection therewith, requiring that foreclosures be initiated only by persons with a security interest in the property and requiring good-faith dealing in loan modification negotiations." O'Connor introduced himself to Representative Angela Williams (Williams) at one of her town hall meetings in Spring, 2013, and inquired as to her position on HB13-1249. O'Connor claims that Williams told him that she "qualifiedly supported" the bill, and while Williams does not recall telling him that, she acknowledges that it was a fair description of her position on the bill at that time. But on April 11, 2013, the House Business, Labor, Economic, & Workforce Development Committee, including Williams, the chair of the committee, voted to postpone the bill indefinitely.

In March 2013, members of the CFRC contacted Williams' office and organized a sit-in outside her office when they did not obtain a meeting with her. At about this time, Williams hosted a "Coffee with Angela" event and also informed proponents of HB13-1249 that she would not be bullied into supporting the bill by tactics such as sit-ins. Over the next several months, O'Connor persistently tried to confront and engage with her regarding HB 13-1249, but she ultimately refused to meet with him due to the threatening and persistent nature of his approaches to her. O'Connor then began to persistently appear at Williams' town hall meetings, demanding to be heard with respect to HB13-1249 without regard for the topics on the agenda or the fact that the bill had already been postponed indefinitely. O'Connor and other CFRC members distributed flyers in Williams' district, urging readers to contact her to express their disapproval of her vote on HB 13-1249. O'Connor also left a personal calling card on the door of Williams' home.

On October 16, 2013, feeling personally threatened by O'Connor's words and actions, Williams had a private attorney file a Motion for Civil Protection Order against O'Connor with the Denver County Court on the grounds of stalking (§18-3-602, C.R.S.) and "Threat or other situation". In the motion she alleged that O'Connor had "relentlessly contacted [her] by phone, by email, through social media, and in person, indicating that the 'pressure' will not stop until she meet[s] with him to discuss the bill." She expressed "heightened concern for [her] physical safety" and indicated that she had sought advice from Capitol staff and the police, asked local police to place extra patrol units near her home, and installed a security camera at her home. She further detailed various encounters

with O'Connor at her Town Hall meetings and asserted that "there is no legitimate reason for Mr. O'Connor to continue to contact me by all available methods except to intimidate me, cause me to fear for my personal safety, and cause me to suffer serious emotional distress." Denver Magistrate Catherine Cary granted the Motion.

On October 26, 2013, O'Connor appeared at a meeting being attended by Williams, at which point police officers served him with the civil protection order, which was temporary in nature, and notice of a hearing on whether or not the order should be made permanent and escorted him out of the room. On November 13, 2013, Magistrate Cary held the hearing, and on November 25, 2013, she denied the motion to make the temporary civil protection order permanent. In her order, Magistrate Cary concluded that O'Connor's statements and actions toward Williams, while persistent, were political rather than personal in nature and did not rise to the level of "true threat" required for restraint of political speech under the First Amendment. But she also noted that "[t]he Court believes that Representative Williams genuinely feels harassed and intimidated by Mr. O'Connor's, frankly, relentless attempts to meet with her."

On February 6, 2014, attorney Darold Killmer sent a letter to Williams indicating that he was representing O'Connor and accusing her of violating O'Connor's First Amendment rights and causing him "significant damage" by seeking a civil protection order against him. Mr. Killmer also claimed that Williams was continuing to "disparage Mr. O'Connor and label him a threat to your personal contacts, which continues to harm his reputation in the community." Mr. Killmer then expressed willingness to secure a "fair and just resolution" for Mr. O'Connor "short of commencing formal legal action." Mr. Killmer requested a response by February 20, 2014.

Williams brought Mr. Killmer's letter to the OLLS shortly after receiving it and the OLLS decided to ask the Committee on Legal Services (COLS) for permission to retain outside counsel to represent Williams in accordance with section 2-3-1001, C.R.S., which allows the COLS to retain legal counsel to represent "any member . . . of the legislative branch of government in all actions and proceedings in connection with the performance of the powers, duties, and functions thereof." On February 21, 2014, the OLLS retained Ed Ramey to represent Williams.

On May 8, 2014, O'Connor filed a federal civil rights lawsuit pursuant to 42 U.S.C. §1983 against Williams in the U.S. District Court for the District of Colorado, alleging in his complaint that Williams violated his: 1) First Amendment rights to engage in political speech and petition the government by seeking a civil protection order against him; 2) Fourth Amendment rights to liberty and freedom of movement by causing law enforcement officers to remove him from a public meeting and prohibiting him from traveling to any location where Williams was present; and (3) Fourteenth Amendment rights by depriving him of liberty without due process by obtaining a temporary civil protection order that restricted his movement and forced him to appear in court and defend himself at a meritless judicial proceeding commenced by Williams "for illegal and retaliatory reasons."

On July 8, 2014, Williams filed an answer, asserting as her main affirmative defenses that: (1) Because Williams did not act under color of state law in taking the actions complained of by O'Connor, those actions did not constitute state action and cannot sustain a claim of a federal civil rights violation under 42 U.S.C. §1983; (2) Alternatively, if Williams' actions were state action, Williams would be entitled to absolute legislative immunity; and (3) Also alternatively, if Williams' actions were state action, Williams would be entitled to qualified immunity from suit. On July 11,

2014, Williams filed a motion for judgment on the pleadings, or, in the alternative, motion for summary judgment, based on the three affirmative defenses listed in her answer. On August 8, 2014, Williams filed a motion for stay of discovery pending resolution of the motion for judgment on the pleadings, or, in the alternative, motion for summary judgment.
On August 11, 2014, O'Connor filed a response to Williams' motion for judgment on the pleadings, or, in the alternative, motion for summary judgment, asking the court to deny the motion asserting that: (1) Williams acted under color of state law "by using her badge of authority as a state representative to invoke the police and judicial system in her effort to silence Mr. O'Connor's protected political speech;" (2) Williams is not entitled to absolute legislative immunity because her conduct in seeking a temporary protective order against O'Connor was not a legislative act; and (3) Williams is not entitled to qualified immunity because she violated O'Connor's clearly established constitutional right of which a reasonable person should have known. On August 26, 2014, the court held a scheduling conference with the parties, subsequently issuing an order that granted Williams' motion to stay discovery and authorized additional briefing regarding the motion for judgment on the pleadings, or, in the alternative, motion for summary judgment. On September 5, 2014, O'Connor filed an amended/supplemental response to defendant's' motion for summary judgment, essentially reiterating the same arguments as in his original response, and on September 15, 2014, Williams filed a reply to the amended/supplemental response, largely incorporating prior arguments by reference and supplementing the qualified immunity argument only.

On October 28, 2014, the court held a hearing on the motion for judgment on the pleadings, or, in the alternative, motion for summary judgment. On November 17, 2014, the court issued a memorandum opinion and order granting Williams' motion for summary judgment (the court treated the initial motion as a motion for summary judgment rather than as a motion for judgment on the pleadings). After making detailed factual findings, the court ruled that Williams' actions in dealing with Mr. O'Connor, including the acts of obtaining a temporary protective order against him and seeking a permanent protective order against him, did not occur under color of state law and did not constitute state action, which is a required element of any claim for a violation of federal civil right under 42 U.S.C. §1983.

Status: O'Connor filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit on December 3, 2014. Once the record of the lower court proceedings are certified to the Court of Appeals, the Court will establish a briefing schedule.

Counsel of record: Darold Killmer and Danielle C. Jefferis of Killmer, Lane & Newman LLP represent O'Connor. Ed Ramey of Heizer Paul LLP represents Williams.

Staff member monitoring this case: Jason Gelender

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

a. Education

i. ***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: The case has been briefed and oral arguments were held before the Court of Appeals on November 19, 2014. An opinion has not yet been issued.

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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ii. ***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. On March 17, 2014, the Colorado Supreme Court granted the Plaintiff's Petition for Writ of Certiorari on several issues.

The Court will review issues relating to: 1) Plaintiff's standing under the "Public School Finance Act of 1994" ("Act") and the right to private action to enjoin Douglas County School District from violating the act; 2) whether the Choice Scholarship Program ("CSP") violates the Act by enrolling students in an illusory charter school for funding under the Act; 3) whether the CSP is entitled to a presumption of constitutionality that can only be rebutted by proof of unconstitutionality "beyond a reasonable doubt"; 4) whether the CSP violates the Colorado Constitution by diverting state education funds to schools controlled by churches and religious organizations and by violating the compelled-support and compelled-attendance clauses of the constitution by directing taxpayer funds to religious organization and compelling students enrolled in a public charter school to attend religious services; and 5) whether the CSP violates the constitution by requiring students who are

enrolled in a public charter school to be taught religious tenets, submit to religious admission tests, and attend religious services.

Oral arguments in the case took place on December 10, 2014.

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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iii. *Masters v. School District No. 1*, Denver District Court, Case Number 14-CV-30371.

Subject: Recent changes to teacher employment statutes ensure that a principal must consent before the school district can place a teacher in the principal's school. The changes also allow a school district to remove a nonprobationary teacher from a school for a variety of reasons. If the teacher cannot secure a position at a new school with the principal's consent within the longer of two hiring cycles or 12 months, the school district must place the teacher on indefinite, unpaid leave. Do these provisions violate the constitutional prohibition against impairment of contracts or constitutional due process requirements?

Background/Issues: In 2010, the General Assembly passed S.B.10-191 (S.B.191), which amended portions of the "Teachers Employment, Compensation, and Dismissal Act" ("TECDA"), Article 63 of title 22, C.R.S. TECDA, both before and after passage of S.B.191, distinguishes between teachers who have probationary status and those with nonprobationary status. A school district for any reason may dismiss or choose not to renew the employment contract of a teacher with probationary status; a school district can dismiss a nonprobationary teacher or refuse to renew a nonprobationary teacher's contract only for specific statutory reasons and only after notice and a hearing.

S.B.191 amended §22-63-202 (2) (c.5), C.R.S., to allow a school district to remove a nonprobationary teacher from a school due to a drop in enrollment; turnaround measures implemented at the school; phase-out of programs; reduction in programs; or reduction in building, including closure, consolidation, or reconstitution. A nonprobationary teacher who is removed can apply for a position in another school, but the teacher may be assigned to a particular school only with the consent of the hiring principal and with input from at least two teachers employed at the school (mutual consent assignment). If a teacher does not secure a mutual consent assignment within the longer of two hiring cycles or 12 months, the school district must place the teacher on unpaid leave until the teacher secures a mutual consent assignment. When the teacher secures a mutual consent assignment, the school district will reinstate the teacher's salary and benefits at the level they would have been if the teacher had not gone on unpaid leave.

On January 29, 2014, five nonprobationary teachers, who are employed by the Denver Public School District (DPS), and the Denver Classroom Teachers Association filed suit in Denver District

Court against DPS and the State Board of Education claiming that the S.B.191 amendments violate the state constitution. All but one of the plaintiff teachers were removed from their schools under the S.B.191 amendments and three of the five have been placed on unpaid leave after being unable to secure mutual consent assignments. The plaintiffs are suing on their own behalf and as representatives of two classes of teachers who are similarly situated.

The plaintiffs allege that the S.B.191 amendments that allow a school district to remove a nonprobationary teacher from a school and subsequently place the teacher on indefinite unpaid leave violate article II, section 11 of the Colorado constitution, which prohibits passage of a law that impairs the obligation of contracts. The plaintiffs argue that TECDA's substantive and procedural requirements relating to removing nonprobationary teachers from a school and to firing nonprobationary teachers (i.e., removal only for specific causes, retention priority rights for nonprobationary teachers, and the right to notice and hearing before dismissal) create contract rights between nonprobationary teachers and their employing school districts. The S.B.191 amendments substantially impair those rights and thereby unconstitutionally impair the contracts between school districts and teachers that the statutes create.

The plaintiffs also allege that the S.B.191 amendments violate article II, section 25 of the Colorado constitution, which states that a person cannot be deprived of property without due process of law. The plaintiffs argue that TECDA's provisions that establish the grounds and notice-and-hearing procedures for dismissal of nonprobationary teachers create in these teachers a protected property interest in continued employment. The S.B.191 amendments allow a school district to effectively dismiss a nonprobationary teacher by putting him or her on indefinite unpaid leave without meeting TECDA's requirements concerning grounds for dismissal and notice and hearing. Therefore, the S.B.191 amendments enable a school district to deprive nonprobationary teachers of a property interest without due process of law, thereby violating the constitution.

On March 31, 2014, the defendants filed a motion to dismiss the complaint, which the trial court granted on June 6, 2014. The court found that TECDA does not create contractual rights between the plaintiffs and DPS. There is a presumption that statutes do not create contractual rights, and the plaintiffs did not provide evidence to overcome that presumption. Also, the court noted that the General Assembly has amended the laws relating to teacher employment, including TECDA, several times, which indicates there is significant state regulation of teacher employment. Due to this history of regulation, the plaintiffs do not have a legitimate expectation that their rights won't change with a statutory change.

The court also found that the S.B.191 amendments do not violate constitutional due process requirements. TECDA does not create a property right in continued employment. And even if it did, removing a nonprobationary teacher from a school and placing that teacher on indefinite unpaid leave is not the same as dismissing the teacher. The court did not equate unpaid leave with dismissal because, when the teacher does secure a mutual consent assignment, the school district must restore the teacher's salary and benefits to the level they would have been at if the teacher had not been placed on leave.

Status: On December 12, 2014, the plaintiffs filed an appeal of the trial court's ruling with the Colorado Court of Appeals.

Counsel of record: Plaintiffs are represented by Bradley Bartels and Brooke Pardee of the Colorado Education Association; Todd McNamara and Mathew S. Shechter of McNamara, Roseman & Kazmierski, LLP; and Alice O'Brien and Philip A. Hostak of the National Education Association. Defendants are represented by Eric Hall and Tamara F. Goodlette of Lewis, Roca & Rothgerber, LLP; and the State Attorney General's office.

Staff member monitoring case: Julie Pelegrin

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iv. *Dwyer v. State of Colorado*, Denver District Court, Case Number 14-CV-32543.

Subject: Article IX, section 17 of the state constitution requires the General Assembly to annually increase statewide base per pupil funding by at least the amount of inflation. In 2010, the General Assembly amended the "Public School Finance Act of 1994" to add a "negative factor" to the school finance formula, which reduces school districts' total program funding for education. Does the negative factor violate the requirements of article IX, section 17 of the state constitution?

Background/Issues: In 2000, the voters passed a citizens' initiative that requires certain increases in funding for public education in the state (Amendment 23). Codified as article IX, section 17 of the state constitution, Amendment 23 specifically requires the General Assembly to increase the statewide base per pupil funding annually by inflation plus one percent for fiscal years 2001-02 through 2010-11 and annually by inflation each fiscal year thereafter.

Under the "Public School Finance Act of 1994", article 54 of title 22, C.R.S., (the Act), the department of education (department) annually calculates the amount of total program funding that each school district receives. It starts with the statewide base per pupil funding amount – set annually in statute – and multiplies that amount by factors that account for each school district's size and cost of living. This sum is the school district's "per pupil funding." The department multiplies the school district's per pupil funding by the number of pupils enrolled in the district then adds certain amounts for at-risk pupils, full-time on-line pupils, and ASCENT program pupils that the school district serves. Before the 2010-11 fiscal year, this final sum was a school district's total program funding.

In 2010, because of decreases in revenue caused by an economic downturn, the General Assembly amended the Act to create what is referred to as the "negative factor". This factor reduces each school district's total program funding as necessary to ensure that the amount of total program funding that the state must appropriate each year does not exceed the amount of revenues that the state has available to fund the Act.

The General Assembly has statutorily increased statewide base per pupil funding by at least the required amount each year since Amendment 23 passed. However, because of the negative factor, the General Assembly in the 2014-15 fiscal year appropriated approximately $894.2 million less than it would have otherwise appropriated to fund school districts' total program funding.

On June 27, 2014, a group that includes parents of students enrolled in public schools, educational organizations, and school districts (the plaintiffs), filed suit against the State of Colorado, Education

Commissioner Robert Hammond, and Governor John Hickenlooper (the defendants), claiming that the statute that creates the negative factor (§22-54-104 (5) (g), C.R.S., is unconstitutional.

In their complaint, the plaintiffs argue that the voters who approved Amendment 23 understood that it required total funding levels for education to grow each year regardless of other funding or revenue needs. The plaintiffs argue that the negative factor is, in effect, applied to statewide base per pupil funding, rather than to the funding affected by the factors in the formula. Thus, because the negative factor reduces statewide base per pupil funding, the state has not complied with the requirements of Amendment 23 to increase statewide base per pupil funding.

In their complaint, the plaintiffs specifically ask the court to enjoin the defendants from implementing the negative factor and require the state to fund education at the level that Amendment 23 would require without application of the negative factor.

On August 12, 2014, the defendants filed a motion to dismiss the compliant. In the motion, defendants argue that the General Assembly has fully complied with the plain language requirement of Amendment 23 to annually increase statewide base per pupil funding and that Amendment 23 does not require increases in the overall amount of funding for public education. The defendants also argued that the plaintiffs lack standing to bring the suit because they do not have a legally protected interest in increased school funding.

In an order issued November 12, 2014, the district court denied the defendants' motion to dismiss. It found that the plaintiffs all have standing to sue and that, since Amendment 23 prescribes minimum increases in the state funding of education, the plaintiffs alleged sufficient facts in their complaint by asserting that the negative factor reduces funding for school districts below the level that Amendment 23 requires.

Status: The court has not set a trial date for this case.

Counsel of record: The plaintiffs are represented by Timothy R. Macdonald and Nathaniel J. Hake of Arnold & Porter, LLP; Sean Connelly of Reilly Pozner, LLP; Kathleen J. Gebhardt of Kathleen J. Gebhardt, LLC; Zhonette Brown of Bryan Cave, LLP; and Jennifer Weiser Bezoza of King & Greisen, LLP. The defendants are represented by the Attorney General's office.

Staff member monitoring case: Julie Pelegrin

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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 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.

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[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.

[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

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.

Status: The Colorado Supreme Court granted certiorari to consider the lawfulness of Rule 4.1 (the successor version of Rule 4.27) and affirmed the judgment of the Court of Appeals. The Supreme Court initially noted that the Tenth Circuit‘s narrow as-applied remedy in *Sampson*, which was carefully tailored to the facts before it, did not render the $200 contribution and expenditure threshold for issue committees under section 2 (10) (a) (II) of Article XXVIII and the retrospective reporting requirement under section 1-45-108 (1) (a) (I) completely inoperable. Accordingly, both Article XXVII and section 1-45-108 can be enforced in future circumstances when such enforcement is constitutional, i.e., in circumstances different from those in *Sampson*.

Because Article XXVIII and section 1-45-108 remain enforceable, the next issue before the Court was whether Rule 4.1 conflicts with either of these still-valid provisions. Considering the requirements of the Rule in light of the plain language of the constitutional provision and rule, two conflicts emerge: 1) On its face, the $5,000 threshold established in the Rule directly conflicts with the $200 threshold established in Article XXVIII; and 2) the reporting exemption in the Rule, which necessitates only *prospective* reporting, directly conflicts with the *retrospective* reporting requirement established in section 1-45-108. Because Rule 4.1 conflicts with both Article XXVIII and section 1-45-108, the Supreme Court determined the Rule was unlawful and set it aside, which upheld the Court of Appeals' conclusion. The Court of Appeals properly concluded that the Secretary had exceeded his authority in promulgating Rule 4.1.

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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).

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. *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

[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

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 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

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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.

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 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

[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.

> 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.

On December 8, 2014, the Colorado Supreme Court denied Secretary Gessler's petition for Writ of Certiorari seeking an appeal of the Court of Appeal's decision. Thus, this case appears to be at an end.

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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iii. ***Independence Institute v. Gessler*, United States District Court for the District of Colorado, Civil Action No. 14-CV-02426 RBJ.**

Subject: Whether Colorado law exempts from the definition of electioneering communication "genuine issue advocacy" as broadcast in a television advertisement when the advertisement seeks action by a government official who also happens to be a candidate in the election.

Background/Issue: The Independence Institute ("Institute") is a nonprofit corporation organized under section 501 (c) (3) of the Internal Revenue Code. The Institute conducts research and educates the public on various aspects of public policy including taxation, education, health care, and environmental issues.

Prior to the November 4, 2014, general election, the Institute considered producing a 30-second television advertisement to be distributed over local broadcast television in Colorado that would call for the state government to audit the Colorado state Health Benefit Exchange (the "Exchange"). The advertisement would mention Colorado Governor John Hickenlooper and ask viewers to call him and to tell him to support an audit of the Exchange.

Because of the expansive definition of "electioneering communication" under Colorado constitutional and statutory law,[12] the Institute will be required to report and disclose its donors and their names, addresses, and occupations if the organization makes a communication that merely mentions Governor Hickenlooper, a candidate for reelection in the 2014 general election, in an advertisement 30 days before a primary election or 60 days before a general election. Considering the time needed to produce the advertisement and raise the funds necessary to air the advertisement,

[12] *See* section 2 (7) of Article XXVIII of the state constitution and section 1-45-103 (9), C.R.S., (definition of electioneering communication) and section 6 (1) of said Article XXVIII and section 1-45-108 (1) (a) (III), C.R.S. (electioneering communication disclosure).

the Institute planned to run the advertisement after September 5, 2014, and, consequently, during the electioneering communication period.

The Institute argues its advertisement is pure issue advocacy. It simply educates the public and asks the Governor to audit the Exchange. Colorado law does not exempt from its definition of electioneering communication "genuine issue speech" when an organization seeks action by government officials who also happen to be candidates. Colorado law does not exempt from its definition of electioneering communication "genuine issue speech" when an organization seeks action by government officials who also happen to be candidates.

The Institute aimed to raise funds for the specific advertisement from individual donors, independent of its general fundraising efforts for other programs. The Institute guards the privacy of its donors, wants to keep all donations for issue speech private, and therefore does not wish to disclose its donors on an electioneering communication report.

On or about September 2, 2014, the Institute filed this lawsuit in federal District Court for the District of Colorado. In its complaint, the Institute alleges "that "Colorado's campaign finance laws chill discussion of state government and public policy issues by forcing putative speakers, including the [Institute] to comply with unconstitutional regulatory burdens when they merely mention a candidate for office, including an incumbent official, and even in circumstances where that speech neither promotes nor disparages the candidate." The Institute "reasonably fears that failure to disclose its donors or report to the state will result in enforcement actions, investigations, and penalties levied by the Defendant [i.e., the Secretary of State], his agents, or a private complaint."

Under the first cause of action, the Institute alleges that Colorado's campaign finance law "impermissibly blurs the line between candidate advocacy, which may be regulated, and issue advocacy, which generally cannot." Thus, the law chills speech, as the Institute and similar speakers are forbidden from discussing public policy issues within 30 days of a primary election or 60 days of a general election without registering and reporting their advertisements as "electioneering communications", thereby violating the privacy of their donors. For this cause of action, the Institute seeks a declaration that, as applied to its advertisement, Colorado law regulating these forms of political communication is overbroad.

Plaintiff's second cause of action concerns the associational burdens of the state's electioneering communication disclosure requirements. Under this cause of action, the Institute alleges that that it wishes to raise funds to run the proposed advertisement but cannot for fear that donors who contribute more than $250 for the advertisement will be disclosed. Colorado law on electioneering communication therefore makes the Institute choose between disclosing its donors or remaining silent on an issue central to its mission. Therefore, on this cause of action as well, the Institute seeks a declaration that, as applied to its advertisement, Colorado law regulating these forms of political communication is overbroad.

In its complaint, the Institute also sought injunctive relief.

Shortly after filing its complaint, the Institute filed a motion for a preliminary injunction. The parties subsequently asked the Court to consider the motion as one for summary judgment, allowing the Secretary of State (the "Secretary") to file a cross-motion for summary judgment and allowing the

parties to obtain a final judgment as to whether the Secretary will be permanently enjoined from enforcing the electioneering communication requirements of Colorado law.

By order dated October 22, 2014, the federal District Court held in favor of the Secretary, concluding that the advertisement at issue can be classified as general issue advocacy but also that application of the reporting and disclosure requirements is constitutional. In the analysis part of its order, the Court noted that every circuit court that has analyzed this issue since the U.S. Supreme Court's *Citizens United* decision has concluded that the distinction between issue speech and express advocacy has no place in the context of disclosure requirements, in part because disclosure is a less restrictive strategy for deterring corruption and informing the electorate. In both the *McConnell* and *Citizens United* decisions, the U.S. Supreme Court has expressly held that an electioneering communication need not constitute express advocacy or its functional equivalent in order to trigger the disclosure requirements. The Institute presents no authority that would require, let alone allow, the District Court to find a constitutionally-mandated exception for its advertisement on the grounds that it constitutes "pure issue advocacy." Accordingly, because the Institute has not succeeded on the merits of its claim, the District Court declined to enjoin the application of the electioneering communication requirements under Colorado law to the Institute's advertisement.

The District Court denied the Institute's motion for preliminary injunction/summary judgment, granted the Secretary's cross-motion for summary judgment, and entered final judgment dismissing the case with prejudice in favor of the Secretary.

Status: It is not known as of December 19, 2014, whether the Institute will be appealing the District Court's order.

Counsel of record: The counsel for the Institute are Allen Dickerson and Tyler Martinez of the Center for Competitive Politics. The Secretary is represented by the Attorney General's office.

Staff member monitoring the case: Bob Lackner

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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 case has been fully briefed. Oral argument on the appeal has not been set as of December 19, 2014.

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. Brohl*, 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 in Federal District Court 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 alleged 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 alleged 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 sought 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 September 9, 2013, the DMA filed a Petition for Writ of Certiorari to the United States Supreme Court.

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.

On November 5, 2013, the DMA filed a Motion for Preliminary Injunction. The Denver District Court heard oral arguments on that motion on January 24, 2014, and granted the preliminary injunction on February 18, 2014. As a result, the DOR may not enforce the law or regulations until further order of the court. Because the United States Supreme Court granted the Petition for Writ of Certiorari on the federal case on July 1, 2014, Judge Hoffman then signed an order shortly thereafter that stayed all proceedings in Denver District Court pending the outcome of the United States Supreme Court appeal on the federal jurisdictional issue.

Oral arguments on the issues raised by the Petition for Writ of Certiorari were held on December 8, 2014.

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. Brohl is represented by the Attorney General's Office.

Staff member monitoring the case: Esther van Mourik

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ii. *Energy & Environment Legal Institute, et al. v. Epel, et al.*, 10th Circuit Court of Appeals, Docket Number 14-1216 (appeal from *American Tradition Institute v. 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.

On May 9, 2014, the district court granted the Defendants' motions for summary judgment concerning Claims 1 and 2 and the standing of Plaintiff Lueck and awarded costs to the Defendants. A final judgment was entered on May 12, 2014, and the Plaintiffs appealed to the Tenth Circuit on June 2.

Briefs have been filed, and the case is scheduled for oral argument on January 15, 2015, at 9:00 a.m.

Counsel of record: Plaintiffs are represented by Michael D. Pepson of Rockville, MD, and David W. Schnare of Burke, VA. Defendants Environment Colorado and other nonprofits are represented

by Bruce Driver and Erin A. Overturf of Boulder and Michael Freeman, Michael Alan Hiatt, Neil Levine, and John E. Putnam of Denver. William Allen and Kathleen Spalding of the Attorney General's office are representing the state Defendants.

Staff member monitoring the case: Duane Gall

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e. Marijuana Legalization

i. *No Over Taxation v. John Hickenlooper*, Denver District Court, 14-CV-32249.

Subject: Constitutionality and legality of the marijuana taxes adopted pursuant to Proposition AA.

Background/Issue: "No Over Taxation", a registered issue committee that opposed the marijuana taxes adopted pursuant to Proposition AA during the 2013 election and a group of individual marijuana consumers and marijuana businesses filed suit against Governor Hickenlooper, the State Department of Revenue, Denver Mayor Hancock, and the Denver Treasury Division. The suit alleges that the marijuana taxes adopted pursuant to Proposition AA ("marijuana taxes"):

1. Violate the constitutional protections against self-incrimination and against double jeopardy;
2. Are void because the state can't collect taxes on an activity that is illegal under federal law;
3. Are "unreasonably impracticable" in violation of Amendment 64; and
4. Confer an inequitable benefit on the defendants since the tax is being collected on an activity illegal under federal law.

The suit seeks a temporary restraining order, preliminary injunction, and permanent injunction ordering the defendants to stop collection of the marijuana taxes.

Status:

Complaint:

Claim 1: The marijuana taxes violate the constitutional protection against self-incrimination. Possession and sale of marijuana are illegal under federal law. The lawsuit claims that paying the tax requires the taxpayer to incriminate him or herself in a federal marijuana crime. The U.S. Supreme Court adopted a similar legal analysis in overturning a criminal conviction under the federal Marihuana Tax Act of 1937. *Leary v. United States*, 395 U.S. 6 (1969).

The marijuana taxes violate the constitutional protection against double jeopardy. A Colorado Court of Appeals decision upheld the dismissal of a case pursuant to the Colorado Controlled Substances Tax because the failure to pay the tax was a penalty for the same conduct that was a crime (selling marijuana) so double jeopardy prevented bringing a case under the Colorado Controlled Substances Tax. *People v. Maurello*, 932 P.2d 851 (Colo. App. 1997). Eleven other states have had state taxes on marijuana or other controlled substances declared illegal under either a self-incrimination analysis or double jeopardy analysis.

Claim 2: The taxes are void against public policy. The lawsuit alleges that taxes are collected on illegal activity are void for illegality and are against public policy. It also argues that federal law is supreme; and the state can't tax an activity that is illegal under federal law even if the state makes it legal.

Claim 3: The marijuana taxes are "unreasonably impracticable". Amendment 64 prohibits any regulation that makes the operation of marijuana establishments unreasonably impracticable. The lawsuit alleges that the cumulative high tax rate created by the marijuana taxes is the highest tax rate on any business in the state, which allows illegal marijuana sales to compete with legal sales and in turn makes the operation of marijuana businesses unreasonably impracticable.

Claim 4: The state is receiving an illegal benefit in tax revenue since the tax is imposed on an illegal activity. Therefore, the defendants are receiving an inequitable benefit.

Motion to Dismiss: The state filed a motion to dismiss. The motion presents three theories for dismissal:

1. Since the plaintiffs are seeking a tax refund, the plaintiffs must exhaust the administrative remedies for tax refunds in titles 24 and 39 of the Colorado Revised Statutes before filing a lawsuit.
2. The plaintiffs are seeking relief on behalf of "any person or entity", but tax refund claims may only be made by taxpayers. So, in order to state their claim the plaintiffs must claim they are taxpayers.
3. The state argues that the complaint fails to state any viable claims for relief.

The plaintiffs filed a response denying the claims in the motion to dismiss and the state filed its reply. The Court has not issued an order on the motion to dismiss.

Motion for Preliminary Injunction: The plaintiffs filed a motion for preliminary injunction. The motion was fully briefed by both sides and the Court held a hearing and denied the motion at the hearing.

Counsel of record: The plaintiffs are represented by Rob Corry and Matthew Buck and the state is represented by Matt Grove, Sueanna Johnson, Robert Dodd, and Kelly Rosenberg of 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.[13] 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.[14] 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 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 Supreme Court heard oral arguments on June 4, 2014, and issued its opinion on October 20, 2014. In essence, the Supreme Court disagreed with the Court of Appeals and instead agreed with the district court, holding that the PERA statute providing for a cost of living adjustment does not establish any contract between PERA and its members entitling them to perpetual receipt of the specific COLA formula in place on the date each became eligible for retirement or on the date each actually retires. The Supreme Court reversed the judgment of the Court of Appeals and upheld the trial court's summary judgment order dismissing the case.

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[13] 54 P.3d 849 (2002).

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

The Court stated that, contrary to Justus's argument, the contracts clause balancing test established in *DeWitt* applies to his claim and that the *McPhail* and *Bills* decisions are not dispositive in deciding the case. The *McPhail* and *Bills* Court did not address the criteria for analyzing and determining whether the legislature intended to create a contractual relationship or vested right, which is the first step in the contracts clause analysis pursuant to *DeWitt.* Instead, in those cases the Court assumed the existence of a vested right and determined that it had been impaired. The Court however, observed several differences between the pension plans at issue in *McPhail* and *Bills* and the PERA COLA at issue in the case:

1. In *McPhail* and *Bills*, the Denver Charter provision that created the vested right stated that retirees "shall be entitled" to an increase in the amount of their pensions, while the statute that governs the PERA COLA does not use those, or any similar words of entitlement creating an unmistakable vested contractual right;
2. In *McPhail* and *Bills*, the pension benefit structure at issue had not materially changed in 35 years. In contrast, the COLA formula paid to PERA retirees changed repeatedly during the employment of each named retiree;
3. The pension provisions at issue in *McPhail* and *Bills* would have fundamentally changed the pension benefit structure and ensured that the retiree benefits could never increase. In contrast, SB 10-001 did not modify the central mechanism for providing retirement benefits. It remained a base benefit plus a separately calculated COLA. While SB 10-001 modified the COLA level, it retained the COLA benefit with potential for future increases.

The Court went on to state that Justus misinterpreted *McPhail* and *Bills* in arguing that they carve out a "public policy exception" when it comes to pension legislation and that a unique test should be applied in the cases of retirement benefits. Applying the modern contract clause test articulated in *DeWitt*, the Court overruled any implication in those cases that pension legislation is not subject to the presumption that the legislature does not intend to bind itself contractually and does not create a contractual right unless it provides a clear indication of its intent to be bound. The Court stated that, because neither *McPhail* nor *Bills* examined the question of whether the legislature intended to contract, the extent to which those cases are applicable to modern contract clause inquiries is limited.

Instead, the Court proceeded with the first prong of the contract clause analysis under *DeWitt* to determine whether PERA retirees have a vested right to the COLA, therefore establishing a contractual relationship. The Court stated that it observed "no contractual or durational language stating or suggesting a clear legislative intent to bind itself, in perpetuity, to paying PERA members a specific COLA formula." The Court pointed to portions of the PERA statute that do create firm, durational, contractual obligations on the part of the legislature. For example, "vested benefit" is defined in part as "an entitlement to a future monthly benefit…" The Court stated that this language is clear evidence of the legislature's intent to be bound to pay PERA members their vested benefit for life. However, no such language exists in the statutory language governing the COLA formulations.

The Court stated "[w]e can discern from the legislative history surrounding the COLA amendments that the legislature has never intended to bind itself to paying PERA members the particular COLA formula in place at the time of their eligibility for retirement without change for life. Indeed, the General Assembly reserved the ability to respond to variations in the rate of inflation and the financial soundness of the PERA plan. Retirees therefore could not have reasonably expected that

the State's provision of any given COLA was a statutory contract protected from change by the Contract Clause of the U.S. and Colorado Constitutions."

Finally, the Court concluded that "[t]he General Assembly's latest modification of the COLA formula is consistent with the PERA legislation's historical base pension benefit and changeable cost of living adjustment structure. Senate Bill 10-110's COLA reformulation did not violate the Contract Clauses of the Colorado or United States Constitutions."

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;[15] 3) A writ of mandamus allowing the Treasurer to examine all records requested; 4) Issuance of a mandatory injunction allowing the Treasurer to examine all records requested; and 5) A legal declaration that the PERA Defendants timely present records in a format that will allow the Treasurer reasonable access to such records.

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

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[15] 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."

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. On August 18, 2014, the Colorado Supreme Court denied the Treasurer's Petition so the case is concluded.

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. Same-Sex Marriage

i. ***Brinkman and Burd v. Long and the State of Colorado and McDaniel-Miccio, et al. v. State of Colorado.*** **Case No. 13-CV-32572.**

Subject: Challenges to the constitutionality of Section 31 of Article II of the state constitution which states that only a marriage of one man and one woman shall be valid or recognized as a marriage in Colorado.

Background/Issue: In 2000, the General Assembly amended §14-2-104 (2), C.R.S., to limit marriage to one man and one woman. In 2006, the voters of Colorado approved an initiated measure to the state constitution that limited marriage to one man and one woman. This case involves two groups of plaintiffs. On October 30, 2013, a same-sex couple sued the Adams County clerk and recorder after they applied for a marriage license and were denied the marriage license based on Colorado law. On February 19, 2014, nine same-sex Colorado couples, some who wished to marry, and others who sought to have their lawful out-of-state marriages to be legally recognized in Colorado sued the Denver county clerk and recorder and Governor Hickenlooper. The Chief Justice of Colorado consolidated the two cases and directed that the case be heard in Adams County by Judge C. Scott Crabtree.

Status: The plaintiffs claimed that Colorado's ban on same-sex marriage singled out same-sex couples for discrimination and relegated them to second-class status compared to married, different-sex couples. They asserted that their rights under the Equal Protection and Due Process clauses had been violated. They asked the Court for: 1) A declaration that the state's same-sex marriage ban was unconstitutional; 2) recognition of out-of-state same-sex marriages; and 3) a permanent injunction preventing defendants from denying the unmarried plaintiffs the right to marry.

On July 9, 2014, Judge Crabtree of Adams County granted summary judgment to the plaintiffs and held that Section 31 of Article II of the state constitution was unconstitutional. The Court held that the right to marry is a fundamental right. The Court held that the State does not have a sufficiently important or compelling interest in forbidding same-sex marriages or nullifying residents valid out of state same-sex marriages. The Court held that the marriage bans were unconstitutional because they violate plaintiffs' due process and equal protection rights. The Court also found that confining same-sex couples to civil unions is further evidence of discrimination against same-sex couples and does not ameliorate the discriminatory effect of the marriage bans.

The Court granted summary judgment for the plaintiffs and dismissed the Denver plaintiffs' complaint against Governor Hickenlooper. The order immediately stayed the decision pending resolution of the issue on appeal.

Despite the stay, several Colorado counties began issuing marriage licenses to same-sex couples. They were doing this based on rulings from the 10th Circuit, which includes Colorado, finding same-sex marriage bans in Utah and Oklahoma unconstitutional (see summary of those cases below). The Attorney General, John Suthers, filed injunctions against the county clerk and recorders enjoining the clerks from issuing marriage licenses to same-sex couples. The combined case was appealed to the Colorado Supreme Court, and on July 18, 2014, the Colorado Supreme Court ordered that Colorado clerks were stayed from issuing marriage licenses to same-sex couples pending resolution of the appeal. The newspapers have reported that approximately 350 same-sex couples in Colorado were issued marriage licenses before October 7, 2014 (the date the United States Supreme Court denied certiorari on the 10th Circuit decisions and other appeals).

On October 7, 2014, the United States Supreme Court declined to issue certiorari to review the appeals from several circuit courts that had struck down state marriage bans, including two decisions from the 10th Circuit, *Kitchen v. Herbert,* (Utah's marriage bans were held unconstitutional), and *Bishop v. U.S. ex.rel. Holder,* (Oklahoma's marriage bans were held unconstitutional). The effect of not granting certiorari in *Kitchen* and *Bishop* was to allow same-sex marriages to become legal and recognized in Utah and Oklahoma. After the denial of certiorari, the Colorado Attorney General filed a motion with the Colorado Supreme Court for dismissal of the state appeal. On October 8, 2014, the Colorado Supreme Court lifted the stays in *Brinkman v. Burd* and *McDaneil v. State of Colorado*. The Attorney General then issued a statement on October 8, 2014, that same-sex marriages were now legally recognized in Colorado.

Counsel of record: The Adams County plaintiffs were represented by Ralph Ogden and Anne Wilcox from the law firm of Wilcox and Ogden, P.C. The Denver County plaintiffs were represented by John McHugh and other attorneys from the law firm of Reilly Pozner LLP, Marcus Lock from the law firm of Law of the Rockies, and Ann Gushurst from the law firm of Gutterman Griffiths PC. Jack Finlaw and Ben Figa represented the Governor. The Attorney General's Office represented the State of Colorado. Wendy Shea from the Denver City Attorney's office represented Debra Johnson, the Denver County Clerk and Recorder. Heidi Miller, Adams County Attorney, and Jennifer Stanley, Assistant Adams County Attorney, represented Karen Long, the Adams County Clerk and Recorder.

Staff member monitoring the case: Debbie Haskins

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ii. ***Kitchen v. Herbert,*** 755 F. 3d 1193 (10th Cir. 2014).

Subject: Challenges to Utah constitutional provision and statute limiting marriage to only one man and one woman.

Status: The United States Court of Appeals for the Tenth Circuit held the Utah constitution and the statutes banning same-sex marriage unconstitutional. The Court held that "the Fourteenth Amendment [to the United States Constitution] protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union."

On October 7, 2014, the United States Supreme Court declined to issue certiorari to review the appeal of *Kitchen v. Herbert* and to review other appeals, thereby allowing same-sex marriages to become legal and recognized in Utah.

Staff member monitoring the case: Debbie Haskins

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iii. *Bishop v. U.S. ex. rel. Holder,* 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

Subject: Challenges to the Oklahoma constitution limiting marriage to only one man and one woman.

Status: The United States Court of Appeals for the Tenth Circuit held that part A of the Oklahoma Constitution which stated that marriage is only between one man and one woman violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by precluding same-sex couples from receiving an Oklahoma marriage license. The Court issued an injunction against enforcement of the marriage ban and issued a stay of the decision pending appeal.

On October 7, 2014, the United States Supreme Court declined to issue certiorari to review the appeal of *Bishop v. U.S. ex. rel. Holder* and to review other appeals from other circuit courts, thereby allowing same-sex marriages to become legal and recognized in Oklahoma.

Staff member monitoring the case: Debbie Haskins

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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)[16].

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 (designated bridges). FASTER also authorized the Bridge Enterprise to impose a bridge safety surcharge (surcharge) on most motor vehicles registered in Colorado at the time of registration and to issue revenue bonds payable from the proceeds of the surcharge (bonds) to finance its business activities.

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

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 the surcharge and issued bonds without obtaining voter approval for either action.

On May 21, 2012, the TABOR Foundation ("Foundation"), which describes itself as "a nonprofit public-interest organization . . . dedicated to protecting and enforcing [TABOR]", filed a civil complaint in Denver District Court against the Bridge Enterprise, the Colorado Transportation Commission ("Commission"), and the members of the Commission, who also serve as the board of directors of the Bridge 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 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 bonds without prior voter approval. The Foundation further alleged that the reasons why the Bridge Enterprise is not a TABOR enterprise are that the state of Colorado granted it ownership of seventy-seven designated bridges, which amounted to a grant of more than ten percent of the Bridge Enterprise's revenue, and that the surcharge is a tax, which an enterprise may not impose, rather than a fee.

The Foundation requested that the court: (1) Declare the surcharge unconstitutional and enjoin the Bridge Enterprise from imposing it in the future; (2) Declare the Bridge Enterprise's bonds unconstitutional and enjoin the Bridge Enterprise from issuing additional 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 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 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 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 fifty-six designated 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 surcharge or issue 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 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 money 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 surcharge and issued bonds.

On September 16, 2013, the Foundation filed an appeal with the Colorado Court of Appeals. On January 21, 2014, the Foundation filed an opening brief that largely reiterated its prior legal claims and specifically argued that the Denver District Court had erred in denying its claims for relief because: (1) The surcharge is a tax requiring voter approval and the district court had "ignored the case law defining TABOR-exempt fees"; and (2) The Bridge Enterprise does not operate as a TABOR-exempt business enterprise and thus must have voter approval to issue bonds. On March 12, 2014, Defendants filed a joint answer brief, arguing that: (1) The surcharge is a fee, not a tax; and (2) The Bridge Enterprise qualifies as a TABOR Enterprise because it did not receive grants in excess of ten percent of its annual revenues. On April 2, 2014, the Foundation filed a reply brief.

On August 14, 2014, the Court of Appeals issued an opinion affirming the Denver District Court's judgment in favor of Defendants. The Court of Appeals first held that the surcharge is not a tax

because: (1) Its primary purpose is to fund a specific service, the repair and replacement of designated bridges, rather than to fund general government purposes; (2) Surcharge revenues are deposited to and expended from special designated accounts where they are segregated from other state money and spent only to fund the repair and replacement of designated bridges and therefore cannot be spent for general government purposes like taxes can; (3) The amount of the surcharge is reasonably related to the cost of repairing and replacing designated bridges; (4) The surcharge is levied on a class, persons who register motor vehicles in Colorado, who are reasonably likely to benefit from the service even though not every motor vehicle crosses a designated bridge; and (5) Colorado law does not require the surcharge to be voluntary to be considered a fee. The Court of Appeals then held that the Bridge Enterprise is a TABOR-exempt enterprise because: (1) The surcharge is a fee, not a tax; (2) The Bridge Enterprise is a business "because it pursues a benefit and generates revenue by collecting fees from service users"; and (3) The applicable statutory definition of "grant" set forth in §43-4-803 (13), C.R.S., which defines "grant" as "any direct cash subsidy or other direct contribution of money from the state or any local government in Colorado which is not required to be repaid" and specifically excludes "[a]ny federal funds received by the [Bridge Enterprise] regardless of whether the federal funds pass through the state or any local government prior to receipt by the [Bridge Enterprise]" is valid and precludes both designated bridges and federal funds received by the Bridge Enterprise from being "grants".

Status: On September 25, 2014, the Foundation filed a Petition for Writ of Certiorari with the Colorado Supreme Court, and the Court is still considering whether or not to grant certiorari and review the Court of Appeals decision. The Foundation presented three issues: (1) "Whether an involuntary bridge surcharge levied on vehicle registration is a tax or a TABOR-exempt fee when the vehicle does not cross bridges funded by the surcharge"; (2) "Whether a TABOR-exempt enterprise must be operated as a self-supporting business and the transactions between the enterprise and customers must be market exchanges taking place in a competitive arms-length manner;" and (3) "Whether the General Assembly's definition of 'grant' in C.R.S., §24-77-102 (7) correctly interpreted the purposes and meaning of TABOR." In the petition, the Foundation argues that the surcharge is a tax "because it is collected without regard to any services utilized by the vehicles charged," and the Bridge Enterprise is not a TABOR-exempt enterprise because: (1) Its "revenue is not derived from market exchanges taking place in a competitive arms-length manner, but rather from an involuntary surcharge on vehicle registration, government grants, and bonds," and it is thus not a government-owned business; and (2) The federal money it received was in fact a state grant because the Transportation Commission had discretion regarding whether or not to pass it on to the Bridge Enterprise. On October 20, 2014, Defendants filed an opposition brief to the Petition for Writ of Certiorari, arguing that: (1) The Foundation failed at both trial and on appeal to establish that the challenged statutes establishing the surcharge as a fee rather than a tax, declaring the Bridge Enterprise to be a TABOR enterprise (and thereby exempting it from TABOR voter approval requirements), and defining "grant" to exclude federal funds are unconstitutional beyond a reasonable doubt; and (2) The Court of Appeals followed clear, binding Colorado Supreme Court case law in determining that the surcharge is a fee rather than a tax. On October 27, 2014, the Foundation filed a reply in support of the Petition for Writ of Certiorari, arguing that: (1) Because the Foundation did not challenge the facial validity of any statutes, Defendants mischaracterized the case and that the "beyond a reasonable doubt" standard of review does not apply; (2) The Court should grant the petition to ensure that there is a meaningful legal distinction between a tax and a fee; and (3) The Court should grant the Petition to ensure meaningful limits on TABOR enterprises.

Counsel of record: James Manley and Steven Lechner of the Mountain States Legal Foundation represent the Foundation. John Suthers, Harry Morrow, Megan Paris Rundlet, and Robert Huss of the Attorney General's Office represent the Bridge Enterprise. Mark Grueskin of Recht Kornfield 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 alleged 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 sought 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 trial court found that, as a matter of law, the charge on disposable grocery bags was a fee and not a tax. Accordingly, the Court granted the City of Aspen's motion for summary judgment and entered judgment in favor of the City. CUT has appealed the judgment to the Colorado Court of Appeals.

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 were some items that were exempt from the state tax that were subject to the districts' tax, and vice versa. For example, RTD and SCFD taxed the sales of low emitting motor vehicles, but the state did not. The state taxed the sale of candy and soft drinks, but RTD and SCFD did not.

In 2013, 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 would 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 Court is considering the parties' cross motions for summary judgment.

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

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iv. *Bishop and Thompson v. City of Aurora and Aurora Urban Renewal Authority*, Adams County District Court, Case Number 2014-CV-30384.

Subject: The legality under the state constitution and the state's urban renewal law of tax incentives offered by a municipality to a private developer for construction of a hotel/resort/conference center project that is located in Aurora, Colorado and is popularly known as the Gaylord project.

Background/Issue: This is an action brought by two taxpayers of the City of Aurora ("City") challenging the legality of certain ordinances, agreements, and hundreds of millions of dollars in tax increment subsidies allegedly given by the City to a private developer for construction of what has become known as the Gaylord hotel/conference center project (the "Project").

On or about February 25, 2014, Plaintiffs David Bishop and Regina Thompson ("Plaintiffs") commenced this action by filing a complaint in Adams County District Court. Among other allegations, the complaint asserts that the subsidies given to the developer for the Project amount to approximately $300 million over 30 years.

The City passed an ordinance creating a structure by which residents of a geographic area less than coterminous with the municipality as a whole could petition the City to put on the ballot an enhanced tax for that less than citywide area, referred to as an "Enhanced Taxing Area" ("ETA"), which question of voter approval of the tax would be submitted to the voters of only that area rather than the entire district.

The complaint alleges that the ETA encompasses land in the City owned by a single landowner associated with the Project. By this means, the City allegedly gave the developer the power to set tax rates for its property which the City would, in turn, give back to the developer to be used to finance the development of the Project. The City allegedly allowed the landowner to appoint a Denver resident to cast the sole vote needed to support the subsidy and to bind taxpayers of the City for 30 years. Plaintiffs allege this conduct violated Colorado law, including section 20 of Article X of the state constitution ("TABOR"). Plaintiffs further allege that, in addition to ignoring the right of citizens of the City to vote on increased taxes and city revenue, the City also violated the state's urban renewal law by declaring the proposed site of the project—agricultural land near Denver International Airport—"blighted" despite a clear statutory prohibition against this designation. The proposed site cannot be "blighted" and without this designation, the entire Project fails.

The named plaintiffs, David Bishop and Regina Thompson, are residents of the City who pay taxes into the General Fund of the State of Colorado and the City.

Plaintiffs seek a court declaration that the tax increment subsidies are invalid, illegal, and unconstitutional absent consent by the voters of the City in compliance with TABOR; a declaration that the City acted *ultra vires* in creating the ETA; and a declaration that the City additionally violated Colorado law in allowing the site of the project to be designated as blighted.

More specifically, Plaintiffs' first two claims for relief request a declaration that the City's two ordinances creating the ETA violate TABOR because they allow for the imposition of increased local government tax rates causing a net revenue gain to the City without allowing the entire electorate of the City to vote on the proposed tax increase. Their third claim for relief alleges that the City violated TABOR in that the enhanced taxes it purports to raise through one of the underlying ordinances violate TABOR's maximum spending limits. Plaintiff's fourth claim alleges that the ETA is a special district that is not authorized by the General Assembly. Accordingly, Plaintiffs seek an order from the court finding and declaring an incentive agreement ("Incentive Agreement") entered into among the City, the Aurora Urban Renewal Authority ("AURA") and the developer is void and unenforceable because it is premised on the payment of tax revenues generated from an unauthorized special district. The fifth claim for relief seeks a court declaration that the Incentive Agreement is unconstitutional and void as a violation of TABOR's prohibition

against multi-year fiscal obligations. Plaintiffs last, or sixth claim for relief alleges that the City's urban renewal plan is invalid because it unlawfully includes "agricultural land" in direct violation of Colorado law. Absent a valid urban renewal plan, the City is not authorized to receive any of the tax revenues provided for in the Incentive Agreement. Plaintiffs seek an order declaring the Incentive Agreement void and unenforceable because it is premised upon an illegal urban renewal plan.

On or about March 20, 2014, Defendants City and AURA (collectively "Defendants") submitted their Motion to Dismiss the Complaint. In this pleading, the Defendants argue that the Complaint is based on a misreading or mischaracterization of the Defendants' documents and erroneous interpretations of Colorado constitutional and statutory law. Defendants further allege the legal basis for the Complaint is fundamentally flawed and cannot support the relief requested. In their motion to dismiss, the Defendants asserted the following arguments in support of dismissing each of Plaintiffs' claims:

1. Defendants seek dismissal of Plaintiffs' first and second claims for relief (City's failure to comply with TABOR election requirements in creating of ETA) by alleging that TABOR does not limit a home rule city's power to create an ETA and impose an increased excise tax rate following a vote of the residents of the affected area; the ordinance allowing the designation of the ETA does not result in a tax policy change directly causing a net revenue increase to the City that would require voter approval; and the 30-day limitations period on challenges to the creation of an ETA does not render it unconstitutional under TABOR.
2. With respect to Plaintiffs' third claim for relief (violation of maximum spending limits under TABOR), Defendants assert that the City is receiving no revenue from the ETA; even if the tax increment revenue is considered revenue, the City achieved prior voter approval for the revenue change; and the allocation of tax revenue does not constitute a "pledge" of tax revenues or a multiple-fiscal year financial obligation of the City.
3. Defendants argue Plaintiffs' fourth claim for relief (unlawful creation of special taxing district) should be dismissed because Plaintiffs lack standing, are untimely, and seek improper relief.
4. Plaintiffs' fifth claim for relief (violation of TABOR's prohibition on multiple-year fiscal obligations) should be dismissed because the City has not, under any provision of the Incentive Agreement, made any promise or incurred any obligation representing a debt, indebtedness, or multiple fiscal year financial obligation in the Colorado constitutional sense.
5. Plaintiffs' sixth claim for relief (illegal designation of agricultural land under urban renewal plan) should be dismissed because Plaintiffs lack standing, are untimely under CRCP 106, and fail to state a claim for relief. The City's inclusion of the agricultural land in the urban renewal area was proper under certain exemptions to the agricultural land prohibition in the statute relied upon by Plaintiffs.

On or about April 14, 2014, Plaintiffs responded to Defendants' Motion to Dismiss. In this pleading, the Plaintiffs made the following arguments in opposition to the Motion to Dismiss:

1. The City has not established "beyond doubt" or otherwise that Plaintiffs' first and second (City's failure to comply with TABOR election requirements) and third claims for relief (violation of maximum spending limits under TABOR) should be dismissed. The City failed to conduct a proper TABOR election among all voters in the City. The City's "enhanced" taxes represent a tax policy change directly causing revenue gain for the City. An increase in spendable City revenue, resulting from this fiscal policy, has not been approved by City

voters. The City's 30-day limit on challenging the enhanced taxes violates TABOR. The City has not substantially complied with TABOR's election requirements.

2. The City has not established "beyond doubt" or otherwise that Plaintiffs' fourth claim for relief (City's unauthorized formation of a special taxing district) should be dismissed. The City's City Council exceeded its powers in creating the ETA in the manner of a special district. Plaintiffs have standing to sue the City, their action is timely, and their requested remedy is appropriate.
3. The City has not established "beyond doubt" or otherwise that Plaintiffs' fifth claim for relief (violation of TABOR's prohibition on multiple-year fiscal obligations) should be dismissed. Specifically, the incremental revenues from City taxes are allocated to the Project for 30 years, and the revenues from the ETA and from property taxes levied by the general improvement district are allocated for 33 years even though state law limits the allocation of such revenues to a 25-year period. The City's obligation to pay over tax revenues for the additional 5 and 8 years is inconsistent with AURA's authority under state law. Because it was not an authorized act of an urban renewal authority and was, in fact, an *ultra vires* act of the City, the promise to transfer these tax revenues became a multi-year obligation that was not presented to voters as required under TABOR.
4. The City has not established "beyond doubt" or otherwise that Plaintiffs' sixth claim for relief (illegal designation of agricultural land under urban renewal plan) should be dismissed. Plaintiffs have standing to pursue this claim, which was timely filed in light of CRCP 106. The cited statute, limiting an urban renewal authority's use of agricultural land, applies to AURA.

By order dated June 2, 2014, the District Court dismissed Plaintiffs' sixth claim for relief (illegal designation of agricultural land under urban renewal plan) on the grounds that the declaratory relief action is untimely under CRCP 106 (court review of quasi-judicial actions of a governing body). Specifically, the City's urban renewal plan was adopted on September 26, 2011. Under CRCP 106, Plaintiffs had 30 days from that date to seek judicial review. However, the complaint was not filed until February, 2014. As such, the District Court lacks jurisdiction to conduct the review sought by Plaintiffs in their sixth claim for relief.

By order dated June 20, 2014, the district court dismissed Plaintiffs' fourth claim for relief (City's unauthorized formation of a special taxing district). First, the Court found that the special district claim is not justiciable. Because no one claims the ETA was created pursuant to the Special District Act ("SDA"), the request for declaratory relief that it was not created in accordance with said Act is not justiciable. No actual controversy exists about whether the ETA qualifies as a special district or whether its creation complied with the procedures in the SDA. No one claims that it does. The "issue" presents no actual controversy based on real facts.

Second, the Court ruled that a home rule city has authority to create an ETA. Plaintiffs' fourth claim for relief was based on section 18 (1) (d) of Article XIV of the state constitution, which provides a specific grant of authority to the General Assembly to enact special taxing districts. However, the text does not presume to limit any authority of home rule cities to do the same. Here, the ETA does not conflict with state action.

By order dated August 29, 2014, the District Court denied Defendants' Motion to Dismiss Plaintiffs' first, second, and third claims for relief. With respect to the first claim (City's failure to comply with TABOR election requirements in creation of ETA), the court held that the claim rises and falls on a

single issue: Does the voter approval a district must obtain before increasing tax rates require submitting the question to the voters solely on a districtwide basis or can a district define an electorate that is less than districtwide? While this claim will likely ultimately be resolved as a matter of law, the court held that it was not prepared at this stage of the process to state unequivocally that Plaintiffs will not prevail on the claim under any circumstances. Plaintiffs' second claim is largely the same as the first. The court noted that this claim (directed towards a different city ordinance) may be capable of being resolved in a manner that does not require addressing the overarching legal issue present under the first claim. In any event, the court ruled that, with this claim also, it cannot say at this stage that there are no circumstances in which Plaintiffs will not prevail.

The Court also declined to dismiss Plaintiffs' third claim for relief (violation of maximum spending limits under TABOR) on the ground that Defendants' argument for dismissing this claim raise factual issues that cannot be resolved by mere reference to the pleadings. Finally, the Court declined to dismiss Plaintiffs' fifth claim ((violation of TABOR's prohibition on multiple-year fiscal obligations) on the grounds that, as with the third claim, outstanding factual issues prevent this claim from being resolved at the pleadings stage.

On or about September 12, 2014, the Defendants submitted their Answer to the Complaint. In their Answer, the Defendants denied any of Plaintiffs' factual allegations evidencing misconduct, asserted a number of affirmative defenses, and denied any violation of TABOR or state statutes.

Status: A four-day bench trial has been set for March 9-12, 2015.

Counsel of record: Plaintiffs are represented by Mark Grueskin and Heather Hanneman of Recht Kornfeld, P.C., and Shawn D. Mitchell of the Law Office of Shawn D. Mitchell. The Defendants are represented by Michael J. Hyman, the Aurora City Attorney, and by Daniel Lynch, Thomas Snyder, and Michael Frandina of Kutak Rock, LLP, and by Allen Hale and Richard Westfall of Hale Westfall, LLP.

Staff member monitoring the case: Bob Lackner

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i. Transportation Finance

i. ***Drive Sunshine Institute and Cliff Smedley v. High Performance Transportation Enterprise, et al.*, United States District Court for the District of Colorado, Case Number 1:14-CV00844.**

Subject: Whether the high performance transportation enterprise ("HPTE") and various other state agency, state official, state employee, and private entity and individual Defendants, violated: (1) Plaintiffs' federal and state constitutional due process rights; (2) Plaintiffs' federal and state constitutional rights to petition; (3) Plaintiffs' federal and state constitutional rights to free speech; (4) The Colorado Sunshine Law; (5) The Colorado Open Records Act; (6) The Colorado Administrative Procedure Act; and (7) A duty to not take unauthorized actions or assist in unauthorized actions in the name of the HPTE.

Background/Issue: The HPTE is a state enterprise created within the Colorado department of transportation ("CDOT") for the business purpose of "pursuing public-private partnerships and other innovative and efficient means of completing surface transportation infrastructure projects." §43-4-806 (2) (c), C.R.S. In furtherance of this business purpose, the HPTE has engaged in a variety of activities to fund the construction, improvement, and future operation and maintenance of transportation infrastructure in the US 36 highway corridor between Denver and Boulder. A major component of HPTE's activities in this regard is its entry into a fifty-year public-private partnership agreement ("PPPA") with Plenary Roads Denver ("PRD") (a corporate consortium consisting of Plenary Group, Granite Construction, Ames Construction, HDR, Transfield Services, and Goldman Sachs) under which PRD will complete transportation infrastructure improvements, including the construction of express lanes, in the corridor and operate and maintain those improvements in exchange for an exclusive concession that includes the right to charge and collect tolls on the express toll lanes.

Plaintiff Drive Sunshine Institute (DSI) is a non-profit organization that has a stated mission "to speed the adoption of fast electric vehicles powered by renewable energy," and Plaintiff Cliff Smedley is a member of DSI's board. Plaintiffs oppose the PPPA and explicitly asserted in a media release dated February 26, 2014, that the PPPA was "not duly authorized" and that "the February 19, 2014 HPTE Board meeting was held in violation of the Colorado Sunshine Laws and other laws." At the February 19, 2014, HPTE meeting, Colorado state patrol officers removed Plaintiff Smedley, DSI advisory board chair Ken Beitel, and DSI counsel Karen Hammer, when they refused to comply with HPTE procedures regarding testimony from members of the public, and the HPTE board unanimously approved (pending final approval from the state transportation commission) the PPPA.

On March 24, 2014, Plaintiffs filed a verified, amended complaint for declaratory, injunctive, and other relief in the United States District Court for the District of Colorado. In addition to the HPTE, the complaint names the following state defendants ("State Defendants"): (1) The director, board members, secretary, and communications director of the HPTE in their official and individual capacities; (2) State attorney general John Suthers and three other attorneys in his office in their official and individual capacities; (3) The Colorado transportation commission; and (4) CDOT. Plaintiffs' amended complaint also names the following private-sector defendants ("Non-state Defendants"): (1) The law firms Kutak Rock LLP and Hogan Lovells US LLP; (2) Individual attorneys from those firms; (2) Goldman, Sachs & Co.; (3) Bank of New York Mellon Trust Company, N.A.; (4) Fitch Ratings, Inc; and (5) PRD.

The amended complaint generally makes sweeping allegations against groups of the Defendants, rather than specific allegations against individual Defendants. Most of the allegations relate to the February 19, 2014, HPTE meeting. Generally Plaintiffs allege that the HPTE and other Defendants violated: (1) Plaintiffs' federal and state constitutional due process rights; (2) Plaintiffs' federal and state constitutional rights to petition; (3) Plaintiffs' federal and state constitutional rights to free speech; (4) The Colorado Sunshine Law; (5) The Colorado Open Records Act; (6) The Colorado Administrative Procedure Act ("APA"); and (7) A duty to not take unauthorized actions or assist in unauthorized actions in the name of the HPTE. In relevant part, the complaint seeks the following forms of relief: (1) Findings of fact and conclusions of law that Defendants committed the alleged violations; (2) Orders and injunctions requiring preservation of records, prohibiting future unauthorized acts and future violations of the nature alleged, enjoining Defendants from issuing bonds without disclosing that they are unauthorized and are not valid HPTE obligations, and

enjoining Defendants who are attorneys from violating their ethical standard of care duties; (3) A declaratory judgment that various HPTE actions and resolution are void, that such actions did not create valid HPTE obligations, that HPTE is subject to the Colorado Sunshine Law, and that HPTE may only set tolls and toll policies through APA-compliant rule making proceedings; and (4) Attorney fees, costs, and sanctions, with interest.

On September 15, several of the Non-state Defendants filed a motion to dismiss the amended complaint, primarily arguing that they are entitled to qualified immunity with respect to Plaintiffs' civil rights claims. On September 17, 2014, the State Defendants filed a motion to dismiss the amended complaint on a variety of grounds, including: (1) Eleventh Amendment immunity with respect to all claims against state agencies or against state officials or employees acting in their official capacities; (2) Lack of standing by Plaintiffs; (3) Failure to state claims of constitutional violations; (4) Qualified immunity for individual State Defendants based on Plaintiffs' making only "general conclusory allegations against defendants as a group [that] are insufficient to satisfy the requirement of personal participation" in constitutional violations; (5) Failure to sufficiently state claims for preliminary or permanent injunctive relief; (6) A lack of supplemental federal jurisdiction over Plaintiffs' state law claims (assuming dismissal of their federal claims); (7) Failure to state a claim for relief under the Colorado Sunshine Law; (7) A lack of a right of private action for Colorado Open Records Act claims; (8) Statutory exemption of the HPTE's actions from the APA, and, alternatively, failure by Plaintiffs' to timely file their APA claims in state court; and (9) Failure to sufficiently allege any violation of "disclosure duties".

Also on September 17, 2014, Plaintiffs filed a verified motion for temporary restraining order and preliminary injunction. On September 18, 2014, the court issued an order denying the motion for temporary restraining order, finding that Plaintiffs "have not demonstrated clearly, with specific factual allegations, that immediate and irreparable injury will result absent a temporary restraining order." The court also indicated that it would set a briefing schedule for the motion for preliminary injunction. On October 7, 2014, the court issued an order denying the motion for preliminary injunction. In that order, the court ruled that Plaintiffs had failed to meet their legal burden of demonstrating "a substantial likelihood that they eventually prevail on the merits of any of their claims tied to the request for a preliminary injunction." The court generally criticized the Plaintiffs' use of "group pleading", the practice of making general allegations against groups of defendants rather than alleging specific facts against each Defendant so that each Defendant has "fair notice" of the grounds for the claims against them. The court then categorized and discussed each of Plaintiffs' claims.

On September 29, 2014, September 30, 2014, and October 14, 2014, several of the Non-state Defendants and the State defendants filed separate motions to stay proceedings pending resolution of the jurisdictional immunity and standing issues raised in the various motions to dismiss Plaintiffs' complaint. On November 10, 2014, the court issued an order granting the motions to stay, citing precedent holding that that immunity defenses "are meant to free officials from the concerns of litigation, including avoidance of disruptive discovery."

Status: The motions to dismiss Plaintiffs' amended complaint filed by the State Defendants and some of the Non-state Defendants are pending before the court. Discovery and other proceedings in the case are stayed pending rulings by the court on the motions to dismiss.

Counsel of record: Karen Hammer of Hammer-Law represents Plaintiffs. John Suthers, and Patrick Sayas of the Attorney General's Office represent the State Defendants. Stephen Peters of Peters Mair Wilcox represents Kutak Rock and Kutak Rock's individual attorney Defendants. Bruce Featherstone represents Defendant Goldman, Sachs & Co. Counsel for other Defendants are not named on documents in the possession of the OLLS.

Staff member monitoring this case: Jason Gelender