SUMMARY OF LITIGATION AFFECTING THE COLORADO GENERAL ASSEMBLY AS OF JUNE 30, 2015

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. ***Low Voltage Wiring, Ltd. d/b/a LVW Electronics v. Colorado General Assembly,*** **Colorado Court of Appeals, Case No. 2014 CA 1967 (appeal from Denver District Court, Case No. 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. At the conclusion of the March 6, 2015, hearing on the General Assembly's bill of costs, the court entered an order awarding the General Assembly costs in the total amount of $48,765.44.

LVW filed a notice of appeal in the Colorado Court of Appeals. 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. LVW and the General Assembly have fully briefed the case in the Colorado Court of Appeals, and the parties are waiting for the assignment of the case to a 3-judge panel of the Court of Appeals and the scheduling of oral arguments.

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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b. *Kerr, et al. v. Hickenlooper*, United States Supreme Court, No. 14-460, United States Court of Appeals for the Tenth Circuit, Case No. 12-1445, United States District Court for the District of Colorado, Civil Action No. 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

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

("Enabling Act"), which set forth the requirements for Colorado statehood, including the requirement that the state have a republican form of government.

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

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

5. In depriving the General Assembly of the power to tax, TABOR nullifies the inherent and necessary powers of the General Assembly under section 2 of article X[2] and sections 31 and 32 of article V of the Colorado Constitution[3] and, consequently, violates both those "superior" provisions of the Colorado Constitution and the Guarantee Clause. As part of this claim, Plaintiffs allege that any amendment to the Colorado Constitution must be read as subordinate to the "superior" obligation of the state to maintain a republican form of government. "The citizens of the [state] were and are constitutionally disempowered to amend the state constitution to derogate or remove power and authority from the legislative branch such that the nature of the state's Republican Form 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

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

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

[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.

Court in arriving at the correct resolution of the standing question presented. The Court ordered the parties (and invited amici) to prepare supplemental briefs on the issue of Plaintiffs' standing and further ordered the parties to focus on 5 specified issues. The parties were ordered to submit their supplemental briefs on or before March 16, 2012.

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

The Defendants subsequently sought an interlocutory appeal of the district court's order on the motion to dismiss with the Tenth Circuit Court of Appeals. The Tenth Circuit granted this request for an interlocutory appeal on September 24, 2012, 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. Defendants' Reply Brief was filed December 2, 2014. As of June 30, 2015, the Supreme Court has not taken action on the Writ of Certiorari.

On June 30, 2015, the U.S. Supreme Court granted the Petition for a Writ of Certiorari, vacated the judgment, and remanded the case to the Tenth Circuit for further consideration in light of *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. ___ 2015.

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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c. *O'Connor v. Williams*, United States Court of Appeals for the Tenth Circuit, Case No. 14-1494 (appeal from United States District Court for the District of Colorado, Civil Action No. 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, and, after the Court established a briefing schedule, filed a brief on February 9, 2015. O'Connor argues that genuine issues of material fact remain as to whether Williams acted under color of state law and that the Denver District Court erred by prohibiting discovery and relying only on inadmissible hearsay evidence. Williams filed a reply brief on March 19, 2015. Williams argues that the court correctly concluded that the undisputed facts of the case established that Williams had not acted under color of state law and that the court had not improperly denied O'Connor an opportunity to conduct discovery. O'Connor filed a reply brief on April 6, 2015. Both O'Connor and Williams have requested an opportunity for oral argument, but the court has not indicated whether it will set a date for oral argument or simply issue a written opinion based on the briefs.

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*****, Colorado Court of Appeals, Case No. 2015 CA 71 (appeal from Denver District Court, Case No. 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" ("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 ("SAC") 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 SAC members at each school consented 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.

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

The District 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 turnaround plans; and new schools.

For the existing schools that were subject to turnaround plans, the new schools that replaced existing legacy schools that were subject to turnaround plans, and three of the five new schools, the District Court found that the District had substantially complied with state statutes concerning innovation schools and denied Plaintiffs' request for declaratory judgment. The District 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 other two new schools that were required because of population growth in the Stapleton area, the District Court held that the Act did not apply to these schools because there was no showing that the schools were failing. The District 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 SACs 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.

Both the Plaintiffs and Defendants appealed the District Court's order. The Plaintiffs did not appeal the District Court's ruling that the three existing conversion schools were properly designated as conversion schools. They appealed the District Court's ruling on the new conversion schools and the five new schools that the District Court held were properly designated. Defendants appealed the District Court ruling that the two new schools in the Stapleton area had not been properly designated.

Colorado Court of Appeals: In a decision dated June 4. 2015, the Court of Appeals ("Appellate Court") affirmed in part and reversed in part. The Appellate Court first held that the District Court possessed subject matter jurisdiction in the case because the court could issue an order like a writ of possessed requiring the District to hold the elections prior to the School Board approving the schools as innovation schools.

The Appellate Court held that section 22-32.5-104 (3) (f), C.R.S., unambiguously requires that an innovation plan include evidence of approval from administrators and teachers employed at the school and the SAC. The District argued that, with a new school, there were no teachers or students, so there could not be a vote of teachers or the SAC. The Appellate Court held that this did not nullify the unambiguous requirement in the statute that the elections be held before the School

Board approved the innovation designation. The Appellate Court found that holding the elections after the designation did not comply with the Act's legislative declaration found in 22-32.5-102 (1) (a) and (1) (c), C.R.S., that stated that the purposes of the advance consent requirements were to ensure that parents have a great opportunity for input in the educational services to be provided and that teachers have the maximum degree of flexibility in providing those services. If the plan has already been approved, these purposes cannot be met.

The Appellate Court noted that all parties agreed that the District Court erred in ruling that Act did not apply to the two new Stapleton schools. Nothing in the Act limits its applicability to failing schools. Since these two schools were designated innovation schools without the required elections, the Appellate Court held that they too were improperly designated.

The Appellate Court remanded the case to the District Court to enter appropriate remedial orders consistent with its opinion. It held that these orders must include an injunction ordering the School District to resubmit innovation plans that comply with the election requirements for all of the schools and enjoins the School Board from approving any new innovation plans that do not comply with those requirements.

Status: On June 4, 2015, the Appellate Court remanded the case to the District Court to enter appropriate remedial orders.

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, and Sean Connelly of Reilly Pozner LLP.

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 Supreme Court, Case No. 2013 SC 233 (appeal from Colorado Court of Appeals, Case No. 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.

On June 29, 2015, the Colorado Supreme Court entered its decision in the case reversing the judgment of the Court of Appeals. The plurality opinion initially held that Plaintiffs lack standing to challenge the CSP under the Act. On this issue, the Court concluded that the General Assembly did not intend to imply a private right of action into the Act and that such a remedy would be inconsistent with the Act's legislative scheme. Therefore, Plaintiffs cannot state a claim for relief under the Act, meaning it does not furnish them with a legally protected interest, one of two prerequisites for standing. Because Plaintiffs lack standing, the Court need not consider whether the CSP fails to comply with the Act. Instead, the Court turned to the issue of whether the CSP violates section 7 of article IX of the Colorado Constitution. This section prohibits school districts from aiding religious schools. Here, the CSP has created partnerships between the school district and religious schools and, in so doing, has facilitated students attending such schools. This constitutes aid to religious institutions as contemplated -- and prohibited -- by section 7. Thus, the Supreme Court concluded that the CSP conflicts with the plain language of section 7 of article IX. The plurality then examined its prior decision in *Americans United*, in which the Court held that a grant program that awarded money to students attending religious universities did not violate section 7. In this case, the Court held that the CSP is distinguishable from the program at issue in the prior case. Finally, the court rejected Respondents' argument that striking down the CSP under the Colorado Constitution constitutes a violation of the First Amendment of the United States Constitution. The Supreme Court remanded the case to the Court of Appeals with instructions to return the case to the trial court for the purpose of reinstating its order permanently enjoining the CSP.

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*, Colorado Court of Appeals, Case No. 14 CA 1348 (appeal from Denver District Court, Case No. 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 Kris A. Gomez 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*, Colorado Supreme Court, Case No. 2015 SA 22 (appeal from Denver District Court, Case No. 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.

In January of 2015, the defendants filed a petition with the Colorado Supreme Court asking the Court to issue a rule that Amendment 23 allows the General Assembly to reduce total state funding for public education as long as it increases the statewide base per pupil funding amount by at least the rate of inflation. On February 6, 2015, the Court issued an order for the plaintiffs to file an answer as to why the Court should not issue the rule requested by the defendants. The Court requested oral arguments, which were held on June 3, 2015.

Status: The trial court proceedings are stayed until the Supreme Court issues its order on the defendant's petition.

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. ***Independence Institute v. Williams*, United States Court of Appeals for the Tenth Circuit, Case No. 14-1463 (appeal from United States District Court for the District of Colorado, Civil Action No. 14 CV 02426 RBJ).[5]**

[5] Wayne Williams replaced Scott Gessler as the named Defendant in the litigation upon succeeding Mr. Gessler as Colorado's Secretary of State.

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 ("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,[6] 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, 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."

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[6] *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).

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: On or about January 7, 2015, the Institute filed its opening brief with the Tenth Circuit seeking a reversal of the District Court's order. The Secretary filed his answer brief on the appeal on

February 25, 2015. On March 16, 2015, the Institute filed its reply brief. As of June 30, 2015, no opinion has been issued.

Counsel of record: The counsel for the Institute are Allen Dickerson and Tyler Martinez of the Center for Competitive Politics and Shayne Madison and John Zakhem of Jackson Kelly, PLLC - Denver. 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*, Colorado Court of Appeals, Case No. 14 CA 0268 (appeal from Denver District, Case No. 13 CV 30421).**

Subject: Judicial review of final action taken by the Independent Ethics Commission ("IEC") against former Secretary of State Scott Gessler ("Gessler") 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 Gessler 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 that Gessler had misused moneys from 2 separate and distinct funds: The Secretary of State's discretionary fund and the Department of State cash fund.

The IEC met on November 5, 2012, asserted jurisdiction over the complaint, and ordered Gessler to respond to it. Subsequently, the IEC reviewed the complaint and deemed it non-frivolous. On November 8, 2012, the IEC served Gessler with the full complaint. On December 20, 2012, Gessler answered the complaint of CEW denying all wrongdoing. In his answer, the Gessler 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, Gessler 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, Gessler also asserted the legal allegations against him were vague and undefined.

At a January 7, 2013, hearing, the IEC denied Gessler'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, Gessler 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, Gessler 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:

- Gessler 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 Association ("RNLA") and thereafter attend a meeting of the Republican National Committee ("RNC"). By using moneys from his discretionary account for other than official business, Gessler 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.
- Gessler'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.
- Gessler'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 Gessler 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 Gessler.

Denver District Court: On July 2, 2013, Gessler sought judicial review of the final action of the IEC in Denver District Court under section 24-18.5-101 (9), C.R.S. Before the District Court, Gessler alleged that: 1) The IEC's enabling provision was unconstitutionally vague and overbroad; 2) the IEC's jurisdiction is limited to investigating improper gifts to public officers and, thus, the IEC exceeded its jurisdiction here; 3) the IEC's findings of fact were arbitrary or capricious; and 4) the IEC violated Gessler's due process rights by, among other things, providing insufficient notice of the charges against him. The district court ultimately rejected these contentions either expressly or implicitly in a written opinion.

Colorado Court of Appeals: Gessler subsequently appealed the District's Court's order to the Court of Appeals. In a written opinion dated May 7, 2015, the Court of Appeals initially rejected Gessler's contention that section 5 of Article XXIX of the state constitution, empowering the IEC

to address claims "under any other standard of conduct and reporting requirements as provided by law," applies only to gifts, influence peddling, and standards of conduct and reporting requirements that expressly delegate enforcement to the IEC. In response, the Court held that the plain language of this section contains no requirement that the referenced standard of conduct expressly delegate enforcement to the IEC. Authority construing that phrase in other contexts has concluded that "as provided by law" invokes laws already in existence.

In addition, the Court rejected Gessler's claims that the public trust statute, §24-18-103 (1), C.R.S., is "hortatory" only and does not provide a specific standard of conduct. The Court concluded that the statute creates a fiduciary duty in public officials and, therefore, sets forth specific standards of conduct. Section 6 of Article XXIX provides an express remedy for violations of the public trust for private gain and Gessler's interpretation of the statute would arguably render that constitutional provision superfluous or a nullity.

Gessler next contended that the discretionary fund statute, §24-9-105, does not fall within the ambit of section 5. In response, the Court rejected Gessler's premise that Article XXIX excludes standards of conduct related to compensation. Moreover, the statute, on its face, did not give Gessler unfettered discretion over the use of the Secretary of State's discretionary funds. To the contrary, the use of those funds was (and is) limited to the "pursuance of official business." Further, the Court rejected Gessler's claim that the discretionary find statute provides no specific standard of conduct. To the contrary the statute limits the use of the discretionary funds to the "pursuance of official business" and, as the IEC concluded, by using funds from his discretionary account for other than official business, Gessler breached the public trust for private gain in violation of the public trust statute. For these reasons, the Court rejected Gessler's assertion that the discretionary fund statute does not fall within the ambit of section 5.

The Court also rejected Gessler's claims that the IEC has construed its jurisdiction so broadly as to render section 5 vague and overbroad. In response, the Court noted that it need not determine the outer limits of the IEC's jurisdiction. Rather, it need only note that it has construed section 5 as to recognize the applicable limits of the IEC's jurisdiction. Having thus construed section 5, it concluded that it need not address Gessler's contingent assertion that a different construction might raise vagueness or overbreadth concerns.

Next, the Court was not persuaded by Gessler's claim that, if the IEC had jurisdiction, its decision was arbitrary or capricious because he properly used discretionary funds to attend the RNLA seminar and to reimburse himself for unreported mileage. Here substantial evidence in the record supports the IEC's determination that Gessler improperly used his discretionary fund to attend the RNLA seminar and the RNC meeting. In light of this evidence, the IEC's finding that Gessler misused his discretionary fund to attend the RNLA seminar and the RNC was not arbitrary or capricious.

Finally, Gessler had contended that he was denied procedural due process because he was not given advance and adequate notice of the standard of conduct that he was accused of having violated. The Court rejected that claim, holding that Gessler received more than ample notice of the claims asserted against him. Among other things, Gessler received both a pre-hearing order and an amended pre-hearing order over one month before the hearing. The amended pre-hearing order set forth six standards of conduct or reporting requirements that the IEC felt were potentially applicable, including the discretionary fund and public trust statutes that Gessler was ultimately

found to have violated. Accordingly, the Court concluded that Gessler received constitutionally adequate notice.

In any event, the Court concluded the record belies any claim of prejudice to Gessler. Gessler, through experienced and able counsel, mounted a vigorous defense to the charges against him, including in his prehearing efforts to have the case dismissed and at the evidentiary hearing. His pleadings and the evidence presented at the hearing amply demonstrate that he was well aware of the charges against him and that he was able to defend against them fully and appropriately.

Counsel of record: Gessler 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 Court of Appeals for the Tenth Circuit, Case No. 12-1175 (on remand from the United States Supreme Court, No. 13-1032).**

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.[7]

[7] Barbara Brohl replaced Roxy Huber as the named Defendant in the litigation upon succeeding Ms. Huber as Executive Director of the Department of Revenue.

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 Federal District Court granted Plaintiff's motion for summary judgment on their claims alleging violations of the Distinct Commerce Clause and denied Defendant's motion for partial summary judgment on the same claims. The district court concluded that the Act and the implementing regulations violate the Commerce Clause and, are, accordingly, unconstitutional. Specifically, the district 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 district 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 district 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. The United States Supreme Court granted certiorari on July 1, 2014.

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. The U.S. Supreme Court issued an opinion on March 3, 2015, remanding the case back to the Tenth Circuit Court of Appeals on the merits. The U.S. Supreme Court reversed the Tenth Circuit's judgment because the Tenth Circuit's dismissal of the case on jurisdictional grounds under the Tax Injunction Act was in error because the Tenth Circuit's reading of the TIA was too broad. Briefs have been exchanged at the Tenth Circuit on the substantive commerce clause claims and oral arguments are set for September 29, 2015.

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.*, United States Court of Appeals for the Tenth Circuit, Case No. 14-1216 (appeal from *American Tradition Institute v. State of Colorado*, United States District Court for the District of Colorado, Civil Action No. 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, 2014.

Oral argument was heard by the Tenth Circuit on January 21, 2015. As of June 30, 2015, no opinion has been issued.

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, Case No. 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.

Plaintiff's Amended Complaint: In December 2014, the plaintiffs filed an amended complaint. The amended complaint alleges the same self-incrimination claim (claim 1) from the original complaint and adds to that claim by alleging the self-incrimination element violates Amendment 64's ban on "unreasonably impracticable" regulations. The complaint added a new claim that the state's laws and regulations related to Amendment 64, but not the constitutional amendment itself, are preempted by federal law. The amended complaint did not include claims 2, 3, and 4 from the original complaint and is no longer seeking a refund of taxes paid.

State's Motion to Dismiss: In January 2015, the state filed a motion to dismiss alleging the plaintiffs have failed to state a claim for relief. The motion argues that there is no self-incrimination violation because those operating under Amendment 64 waived their self-incrimination rights through their voluntary participation in the Amendment 64 marketplace. Further, the right of self-incrimination does not apply in cases that are the byproduct of regulatory compliance if the regulatory scheme is not intended to identify those in violation of the law.

Second, the motion argues that the claim under the federal Supremacy Clause must fail because there is no private right of action under the Supremacy Clause to bring a challenge using the Federal Controlled Substances Act. The motion argues even if there is a private right of action, there is no Supremacy Clause claim because there is no positive conflict or impossibility preemption. To show a positive conflict, there must be more than just an obstacle to federal law and Amendment 64 is merely an obstacle to federal law. Impossibility preemption only applies when state law requires an action that is illegal under federal law, Amendment 64 does not require anyone to use, sell, or grow marijuana in violation of federal law; those doing so, do so voluntarily.

The plaintiffs filed a brief in opposition to the motion to dismiss in February 2015 and the State filed its reply brief in March 2015. As of June 30, 2015, the court has not yet ruled on the motion to dismiss.

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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ii. *Safe Streets Alliance, et al. v. Alternative Holistic Healing, LLC, d/b/a/Rocky Mountain Organic, et al.,* United States District Court for the District of Colorado, Civil Action No. 15-349; *Safe Streets Alliance and New Vision Hotels Two, LLC v. Medical Marijuana of the Rockies, LLC, et al.,* United States District Court for the District of Colorado, Civil Action No. 15-350.

Subject: Constitutionality of Retail Marijuana (Amendment 64).

Background/Issue: In two separate lawsuits, Safe Streets Alliance, an advocacy organization committed to a drug-free America, and some of its business members and individual members sued the state and a number of retail marijuana businesses to vindicate the federal laws prohibiting the cultivation and sale of marijuana. The business and individual members claim that the legal cultivation and sale of marijuana in the vicinity of their businesses or property cause them legal injury. Plaintiffs seek redress under the federal racketeering statute (RICO), which allows a civil lawsuit against those who engage in racketeering activity—including the commercial production of marijuana—to pay those they injure treble damages, costs, and attorney fees. Plaintiffs are also suing the state and local officials who are facilitating Colorado's recreational marijuana trade through a licensing regime that authorizes federal drug crimes.

Status: *Complaint:* The complaints were filed February 19, 2015. Both complaints contain the same legal arguments and substantially similar factual allegations. The complaints allege that federal law prohibits the cultivation and sale of marijuana and that Amendment 64 and its implementing legislation allow the legal cultivation and sale of marijuana in Colorado in violation of federal law. It further alleges that the defendants engage in racketeering activities and conspiracies that further the violations of federal marijuana law. Plaintiffs also claim Amendment 64 and the related laws and regulations are preempted by federal law based on the conflict between federal law and Colorado's regulated retail marijuana system. The complaint seeks monetary damages, a declaratory judgment, and an injunction under RICO directing the marijuana operations affecting their land to stop violating the federal drug laws.

Motions to dismiss: The various defendants filed motions to dismiss for failure to state a claim of relief in both cases in April, 2015. The state argues that the Supremacy Clause claim must fail because there is no private right of action under the Supremacy Clause to bring a challenge using the Federal Controlled Substances Act. The motion argues that, even if there is a private right of action, there is no Supremacy Clause claim because there is no positive conflict or impossibility preemption. To show a positive conflict, there must be more than just an obstacle to federal law and Amendment 64 is merely an obstacle to federal law. Impossibility preemption only applies when state law requires an action that is illegal under federal law, Amendment 64 does not require anyone to use, sell, or grow marijuana in violation of federal law, those doing so, do so voluntarily. As of June 30, 2015, no order has been issued regarding the motions to dismiss.

Counsel of Record: Plaintiffs are represented by David H. Thompson, Cooper & Kirk, PLLC in Washington, D.C. The state is represented by Scott Bauer, Doug Cox, Claudia Goldin, and Sueanna Johnson of the Attorney General's office.

Staff member monitoring the case: Michael Dohr

iii. ***Justin E. Smith, et al., v. Hickenlooper,*** **United States District Court for the District of Colorado, Civil Action No. 15-462.**

Subject: Constitutionality of Retail Marijuana (Amendment 64).

Background/Issue: Sheriffs from Colorado, Nebraska, and Kansas and County Attorneys from Nebraska and Kansas sued the state over the retail marijuana operations in Colorado. The Colorado sheriffs argue that implementing retail marijuana in Colorado requires them to violate federal law related to marijuana and causes them other legal injuries. The complaint also alleges Colorado's legalization of marijuana puts the United States in violation of various international illegal drug treaties. The sheriffs and county attorneys from Nebraska and Kansas claim that retail marijuana has caused an increase in drug-related criminal activity in their jurisdictions and they have suffered legal injuries as a result.

Status: *Complaint:* The complaint makes two claims against the state. First, that Amendment 64 and its related laws and regulations are void under the Supremacy Clause of the U.S. Constitution. Second, that Amendment 64 and its related laws and regulations conflict with federal law and are preempted by federal law. The complaint seeks a declaratory judgment and temporary and permanent injunctions against Amendment 64 and its related laws and regulations.

Motion to dismiss: The state filed a motion to dismiss for failure to state a claim on May 1, 2015. The motion argues that the Supremacy Clause claim must fail because there is no private right of action under the Supremacy Clause to bring a challenge using the Federal Controlled Substances Act. The motion argues that, even if there is a private right of action, there is no Supremacy Clause claim because there is no positive conflict or impossibility preemption. To show a positive conflict, there must be more than just an obstacle to federal law and Amendment 64 is merely an obstacle to federal law. Impossibility preemption only applies when state law requires an action that is illegal under federal law, Amendment 64 does not require anyone to use, sell, or grow marijuana in violation of federal law; those doing so, do so voluntarily. As of June 30, 2015, no court order has been issued on the motion to dismiss.

Counsel of Record: Plaintiffs are represented by Paul V. Kelly, Jackson Lewis P.C., Boston, Massachusetts, Peter F. Munger, Ashley Paige Fetyko, Jackson Lewis P.C. Denver, CO. The state is represented by Bill Allen, Matt Grove, and Frederick Yarger, of the Attorney General's office.

Staff member monitoring the case: Michael Dohr

iv. ***Nebraska and Oklahoma v. Colorado,*** **United States Supreme Court, Case No. 22O144.**

Subject: Constitutionality of Retail Marijuana (Amendment 64).

Background/Issue: Oklahoma and Nebraska filed an original jurisdiction action with the U.S. Supreme Court regarding the constitutionality and enforcement of Amendment 64. The U.S. Supreme Court has original jurisdiction to hear cases involving one state versus another state. The U.S. Supreme Court must decide whether to take the case or not.

Status: *Motion for leave to file complaint and Complaint:* In December, 2014, Nebraska and Oklahoma filed a motion for leave to file a complaint and its complaint with the U.S. Supreme Court. The complaint alleges that Amendment 64 and its implementing laws and regulations are preempted by federal law and void under the Supremacy Clause. The complaint also alleges Colorado's legalization of marijuana puts the United States in violation of various international illegal drug treaties.

On March 27, 2015, Colorado filed a brief in opposition and Oregon and Washington filed amicus curiae briefs in support of Colorado's opposition. Colorado argued that original jurisdiction is not appropriate since Colorado has not invaded the sovereign rights of Nebraska and Oklahoma and the lower courts would be a better place to adjudicate this matter. The state also argues Nebraska and Oklahoma do not have standing in this case since stopping Colorado's regulated medical and retail marijuana markets will not redress Nebraska and Oklahoma's injuries because the injuries suffered are the result of those individuals who choose to violate state and federal law, not the State of Colorado. Finally, Colorado argues that Nebraska and Oklahoma have no cause of action under the federal Supremacy Clause that would preempt Colorado law under the federal Controlled Substances Act.

On April 3, 2015, Nebraska and Oklahoma filed a reply to the brief in opposition. On May 4, 2015, the Supreme Court asked the U.S. Solicitor General to file a brief expressing the federal government's position on the issue.

Counsel of Record: Plaintiff states Nebraska and Oklahoma are being represented by the Attorney Generals of those respective states. Colorado is represented by Frederick Yarger, David Blake, Claudia Goldin and Sueanna Johnson of the Attorney General's office.

Staff member monitoring the case: Michael Dohr

v. *The City of Northglenn, et al., v. Board of County Comm'nrs of Adams County*, Adams County District Court, Case No. 2015 CV 030862.

Subject: Whether a statutory county has legal authority to impose and collect a special sales tax, approved by the registered electors of the county, on the sale of retail marijuana and retail marijuana products within the county.

Background/Issue: At the November 2012 general election, the Colorado voters approved the adoption of Amendment 64 to the Colorado constitution for the personal use and regulation of marijuana. Amendment 64 provides in part for the establishment, licensing, and regulation of retail marijuana stores, manufacturing, cultivation, and testing in Colorado. Following the adoption of Amendment 64, the General Assembly proposed, and the Colorado voters approved, a 10% special retail marijuana state sales tax on the sale of retail marijuana and retail marijuana products. The special 10% state sales tax is levied on all sales of retail marijuana and retail marijuana products in addition to the standard state sales tax.

Section 39-28.8-203, C.R.S., specifies that the state will distribute a portion of the moneys collected from the state special sales tax on retail marijuana and retail marijuana products to local governments including cities, towns, and counties. Section 39-28.8-203, C.R.S., also specifies that the distribution mechanism shall not be "construed to prevent a local government from imposing, levying, and collecting any fee or any tax upon the sale of retail marijuana or retail marijuana products", but that "any local tax imposed other than the local jurisdiction's general sales tax rate

shall not be collected, administered, and enforced by the department of revenue… but shall instead be collected, administered, and enforced by the local government itself."

While section 39-28.8-203, C.R.S., does not prohibit a local government from levying a special sales tax on retail marijuana, it also does not specifically authorize a local government to collect, administer, and enforce a special sales tax for retail marijuana and retail marijuana products. Article 2 of title 29, C.R.S., authorizes counties to impose a general countywide sales tax that applies to all sales made in the county. That article also includes authority for statutory counties to levy and collect other special sales taxes in addition to the general countywide tax. But neither the Colorado Revised Statutes nor the Colorado Constitution specifically authorizes statutory counties to collect, administer, and enforce a special sales tax on retail marijuana and retail marijuana products, or specifically authorizes a statutory county to generally collect, administer, and enforce a special sales tax on any product. Therefore, it is not clear whether a statutory county has the legal authority to impose a special tax on retail marijuana and retail marijuana products.

During the 2015 legislative session, the General Assembly considered Senate Bill 15-40 and House Bill 15-1007, both of which, as introduced, clarified that statutory counties do have the authority to levy, collect, administer, and enforce a special sales tax on retail marijuana and retail marijuana products. Neither bill was enacted into law. (HB 15-1367, which was enacted by the GA, included a provision clarifying that a statutory county has the authority to collect a special sales tax on marijuana in the unincorporated parts of the county but did not address a county's authority to collect such a tax in an incorporated area of the county).

In 2013, the Adams County Board of County Commissioners (BOCC) approved an ordinance banning the operation of retail marijuana establishments within the boundaries of unincorporated Adams County. Between 2013 and 2015, the governing bodies of Northglenn, Aurora, and Commerce City (the Cities), which are all home-rule cities, each approved an ordinance permitting licensed retail marijuana establishments to operate within the respective boundaries of each city.

Between November, 2011 and November, 2014, the registered electors of each of the Cities approved a special sales tax on the sale of retail marijuana and retail marijuana products to be levied in addition to the general tax on all products sold within the city. In September 2014, the Adams County BOCC approved a resolution to refer to the registered electors of the county a ballot issue to impose a special sales tax on the sale of retail marijuana and retail marijuana products sold in the county. On November 4, 2014, the registered electors of Adams County approved the special sales tax.

On May 26, 2015, the Cities and Apogee Management, which operates a Colorado retail marijuana business in Aurora doing business as Terrapin Care Station, filed suit against the Adams County BOCC, claiming that Adams County is without legal authority to impose or collect a special marijuana tax. They also claim that the Cities and the retail marijuana businesses in the Cities will be harmed by the imposition of an unauthorized special marijuana tax because it will put the retail marijuana businesses in the Cities at a competitive disadvantage with other Colorado retail marijuana businesses that are not subject to an unauthorized county special sales tax on retail marijuana and retail marijuana products. In addition, plaintiff Apogee Management claims that it will be required to remit sales tax in a manner that is different from marijuana businesses in other counties and that the different tax treatment is contrary to Colorado law.

In their complaint, the plaintiffs seek a declaratory judgment that the Adams County special sales tax on retail marijuana and retail marijuana products is void ab initio because Adams County's special sales tax exceeds the constitutional and statutory authority delegated to a statutory county. In addition, because Adams County seeks to require retail marijuana businesses in Northglenn and Aurora to collect and customers of retail marijuana businesses located in Northglenn and Aurora to pay the Adams County special sales tax starting on July 1, 2015, the plaintiffs request that the court grant a preliminary and a permanent injunction to preserve the status quo in relation to the payment and collection of sales taxes for retail marijuana and retail marijuana products. The plaintiffs also request their costs and attorney fees and any other relief that the court deems just and proper.

On May 26th, the Cities and Apogee Management (Plaintiffs) also filed a Motion for Preliminary Injunction against Adams County. The Plaintiffs seek a declaratory judgment that the Adams County retail marijuana sales tax and the retail marijuana resolution passed by the BOCC are void ab initio, for exceeding the constitutional and statutory authority delegated to Adams County. In addition, the Plaintiffs seek a preliminary injunction to prevent Adams County from imposing its special sales tax on retail marijuana and retail marijuana products beginning on July 1, 2015.

Adams County filed its response to the Plaintiffs' Motion for Preliminary Injunction on June 4, 2015. In its response, Adams County argues that the Plaintiffs are not entitled to a preliminary injunction because they cannot satisfy the six elements for the grant of such an injunction under Colorado law.[8]

Adams County argues that the Plaintiffs have not satisfied the criteria for a preliminary injunction primarily because there is no reasonable probability of the Plaintiffs' success on the merits. Specifically, Adams County argues that the Plaintiffs lack standing, the County's marijuana sales tax is legal, and granting a preliminary injunction would require the Court to overturn a vote of the Adams County voters.

Adams County argues that the Plaintiffs lack standing for the following reasons:

1. Neither the Cities nor Apogee Management can establish that it has suffered an injury in fact. The County argues that the Plaintiffs' alleged injuries are purely speculative and hypothetical. Apogee Management is not open for business in Adams County and therefore, cannot suffer an injury due to the tax. The Cities cannot establish an injury based on competition as they are not in the retail marijuana business and therefore are not competitors in that market. Furthermore, Adams County argues that different sales tax rates apply throughout the state, and no Colorado court has ever conferred standing upon a municipality or business based on an assertion that differing sales tax rates might someday create a competitive disadvantage.
2. Neither the Cities nor Apogee Management will be paying the tax and therefore will not bear the financial burden of the tax. Adams County argues that the party who bears the financial burden of the tax is the party potentially aggrieved and that, in this case, the people who will bear the financial burden will be the people who purchase retail marijuana.

[8] Under Colorado law, to issue a preliminary injunction, the Court must find that the moving party has demonstrated the following six elements: 1) A reasonable probability of success on the merits; 2) A danger of real, immediate, and irreparable injury which may only be prevented by injunctive relief; 3) That there is no plain, speedy, and adequate remedy at law; 4) That the granting of a preliminary injunction will not disserve the public interest; 5) That the balance of equities favors the injunction; and 6) That the injunction will preserve the status quo pending a trial on the merits. If any of the criteria are not met, the Court cannot provide injunctive relief.

3. Neither the Cities nor Apogee Management has stated a claim for relief by demonstrating the existence of a legal right or interest that has been violated by the action of Adams County. The Cities allege that they have an interest in governing matters of local and municipal concern and that Adams County's marijuana sales tax adversely impacts transactions within municipal limits. In addition, Apogee Management argues that the tax is void because there is no mechanism to collect the tax. Adams County argues however, that there is no legal authority that grants the Cities or Apogee Management the ability to bring suit on this basis.

Adams County further argues that the sales tax is lawful because a plain reading of the language in section 39-28.8-203, C.R.S., grants the authority for local governments to impose, levy, and collect any fee or any tax on the sale of retail marijuana and retail marijuana products. In addition, the statute states that the language in that section does not impact any existing right of a local government to impose such a tax, and requires that the local government imposing such a tax collect, administer, and enforce the tax itself.

Finally, Adams County argues that to grant the relief requested by the Plaintiffs, the Court would be required to overturn a vote of the Adams County voters, including voters of the Cities. Adams County argues that because implementing the will of the voters is of paramount concern, the Plaintiffs should not be able to succeed on the merits.

In addition to its argument that there is no reasonable probability of the Plaintiffs' success on the merits, Adams County argues that the Plaintiffs cannot satisfy any of the other five criteria to justify a preliminary injunction and therefore the Court should not grant a preliminary injunction. On these additional criteria, Adams County argues that:

1. There is no danger of real, immediate, and irreparable injury because, among other reasons, if Adams County improperly collects a tax, there is a procedure for a refund of the tax with interest.
2. There is a plain, speedy, and adequate remedy at law because TABOR requires that tax revenue "collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest for the initial conduct. Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions."
3. Granting a preliminary injunction would disserve the public interest because it would unnecessarily interfere with the lawful collection of a tax by Adams County.
4. Balancing of the equities disfavors the injunction because the equities involved in this case necessitate that the Court respect the results of a validly held election and uphold the rights of the voters of Adams County over the speculative claims of the Plaintiffs.
5. The injunction will not preserve the status quo because the case concerns an issue that was decided in an election more than six months ago. When the Plaintiffs filed their complaint, the sales tax had been approved and Adams County was planning to begin collection. Therefore, the status quo in this case means allowing the tax to proceed.

On June 23, 2015, the District Court issued an order regarding the Plaintiffs' Motion for a Preliminary Injunction. The Court first addressed the issue of standing for the Cities and for Apogee Management. The Court stated that the Adams County marijuana sales tax presents sufficient adverse effect on matters of local concern for the Cities, specifically taxation within their boundaries, and that the impact results in a sufficient threat for the purpose of standing. The Court

stated that Colorado law is clear that home-rule municipalities have legally protected interests in protecting their municipal interests. Therefore, it is both logical and fair that, when presented with evidence that their taxing strategies may be adversely impacted by Adams County's tax, the Cities should have standing the challenge the tax. The Court however, found that Apogee Management lacked standing to proceed in the action. The Court stated that other courts have held that the collector of a tax does not have standing to protest the validity of a taxing statute because the collector is not injured by the statute. In addition, the Court stated that because the existing business owned by Apogee Management is located in a portion of Aurora that is not in Adams County and because a store that will be opening in Adams County was not yet open, Apogee Management has failed to establish an injury-in-fact that is real and palpable.

Regarding the issue of a preliminary injunction, the Court found that the Plaintiffs failed to prove by a preponderance of the evidence, two of the six elements required for a preliminary injunction. First, the Court found that the Plaintiffs had not established a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief. The Court stated that all of the evidence presented by the Plaintiffs that the Adams County tax would cause irreparable harm was speculative, lacked reasonable certainty, and was unsupported by any factual or scientific foundation. Second, the Court found that the grant of the injunction would not serve the public interest. In attempting to assess whether the granting of the injunction serves the public interest, the Court stated that evidence at the hearing established that at the general election, the voters in each of the Cities approved the Adams County 3% retail marijuana tax. The Court stated that although the voters' approval of the tax is not the only consideration, the Court cannot find that the public interest will be served by granting an injunction which seeks to discount the expressed will of the voters in the Cities. Therefore, the Court denied the Plaintiffs' Motion for Preliminary Injunction.

Counsel of record: Corey Y. Hoffmann and Ashley N. Pollock of the law firm Hoffmann, Parker, Wilson, and Carberry, P.C. are representing the City of Northglenn. Michael Hyman, Teresa L. Kinney, and Daniel L. Money are representing the City of Aurora. Robert R. Gehler and Robert D. Sheesley are representing Commerce City. Daniel J. Garfield and Michael J. Milstein of the law firm Foster, Graham, Milstein, and Calisher, LLP are representing Apogee Management, Inc., dba Terrapin Care Station. Heidi M. Miller and Jennifer D. Stanley of the Adams County Attorney's Office are representing Adams County.

Staff member monitoring the case: Nicole Myers

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f. TABOR

i. ***Tabor Foundation v. Colorado Bridge Enterprise,*** **Colorado Court of Appeals, Case No. 2014 CA 106 (appeal from Denver District Court, Case No. 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)[9].

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

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.

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.

As of June 30, 2015, the Supreme Court has not yet taken action on the petition for Writ of Certiorari.

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*, Colorado Court of Appeals, Case No. 14 CA 1869 (appeal from Pitkin County District Court, Case No. 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. On October 4, 2014, CUT filed a notice of appeal with the Colorado Court of Appeals. CUT's opening brief was filed February 20, 2015. On March 19,

2015, Aspen filed its reply brief. On April 20, 2015, CUT filed its reply brief. As of June 30, 2015, the Court of Appeals has not issued a decision in the case.

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.,*** **Colorado Court of Appeals, Case No. 15 CA 582 (appeal from Denver District Court, Case No. 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: The case was originally filed in Jefferson County, but the District Court transferred venue to the District Court for the City and County of Denver In Denver, the parties filed cross-motions for summary judgment. On February 25, 2015, the Denver District Court granted summary judgment in favor of the Defendants. In doing so, the Court concluded that the taxation of the items previously exempted was not a new tax because the initial grant of taxing authority was not expanded, but rather remained constant, as changed over time by the State. In addition, the taxation of these items was an administrative simplification and not a "tax policy change" that required voter approval

under the catch-all provision of TABOR. On April 8, 2015, the Plaintiff filed a Notice of Appeal with the Colorado Court of Appeals. The record on appeal is due July 8, 2015.

Counsel of record: The TABOR Foundation is represented by Jeffrey McCoy 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*, Colorado Supreme Court, Case No. 2015 SA 90 (appeal from Adams County District Court, Case No. 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.

As a result of the Court's orders on the motion to dismiss, only 3 of Plaintiffs' claims for relief remained before the Court: 1) Plaintiffs' first claim seeking a declaratory judgment that the City's ordinance outlining procedures by which it could create ETAs is unconstitutional and void in that it violates TABOR; 2) Plaintiffs' second claim seeking a similar declaration that the City's ordinance creating the specific ETA is unconstitutional and void under TABOR; and 3) Plaintiffs' fifth claim

seeking a declaration that the Incentive Agreement results in an unconstitutional multiple-year fiscal obligation without voter approval.

Defendants filed their motion for summary judgment on Plaintiffs' remaining claims on January 5, 2015, and Plaintiffs filed their motion for summary judgment on their remaining claims on January 6, 2015.

With respect to Plaintiffs' first claim for relief, the Court found that it could not rule, as a matter of constitutional law, that a local government can never conduct a TABOR election in which the electorate comprises less than the entire TABOR district. Essentially, the Court rejected Plaintiffs' claim that TABOR's voter approval requirement mandates district-wide approval in all circumstances. Because Plaintiffs failed to establish, on their facial challenge to the ordinance, that it was unconstitutional beyond a reasonable doubt, the Court granted the Defendants summary judgment on this claim.

On Plaintiffs' second claim for relief, the court noted that the voter approval requirement cannot mean approval by a single voter who will not bear the burden of paying the tax. Rather, "voter approval" means the approval of an appropriately drawn electorate consisting of those within the relevant municipality, county, or other TABOR district who will bear the primary burden of paying the tax. Here, Plaintiffs established beyond a reasonable doubt that the ordinance at issue authorized a TABOR election that did not substantially comply with TABOR's requirements in authorizing and conducting the relevant election. Because the electorate was drawn in such a way as to exclude every citizen of the district, the election cannot withstand even the most deferential scrutiny. The City did not obtain the voter approval as required by TABOR for the tax increases purportedly authorized at that election. Consequently, the Court declared as void both the ordinance and the election it authorized and granted the Plaintiffs summary judgment on this claim.

Plaintiffs' fifth claim for relief concerns the pledge of future tax revenues. Under the Incentive Agreement, AURA and the City have pledged to the developer certain tax revenues as an inducement for bringing the project to the City. Plaintiffs alleged the Incentive Agreement's pledge of future tax revenues runs afoul of TABOR because it is a multi-fiscal year obligation not approved by the voters.

Because of the nature of the tax increment financing at stake, the Court determined there cannot be a time when either AURA or, indirectly, the City, is obligated to pay any amount to the developer that is not available to be paid when due. Because there is, and always will be, adequate cash reserves to satisfy the financial obligation, a TABOR election is not required to approve tax increment financing of this type. Consequently, Plaintiffs failed to establish the tax increment pledge violates TABOR's voter approval requirements for multiple-fiscal year financial obligations and the Court granted the Defendants summary judgment on this claim.

Status: On March 27, 2015, Defendants filed their notice of appeal in the Colorado Supreme Court. The record on appeal is due in the Supreme Court on or before June 26, 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

v. ***National Federation of Independent Business v. Wayne Williams, Colorado Department of State, and the State of Colorado,* Denver District Court, Case No. 2014 CV 34803.**

Subject: The legality of the funding structure used by the Department of State ("Department") under the TABOR provision of the state constitution.

Background/Issue: On December 22, 2014, Plaintiff National Federation of Independent Business ("NFIB") filed on behalf of its members a complaint for declaratory judgment and injunctive relief which challenges the legality of the Department's funding structure on the grounds that it violates TABOR, article X, section 20 of the Colorado constitution. Among other things, the complaint alleges that, because a significant portion of the funds collected from business licensing charges are appropriated to defray general expenses of the Department and the State, the business licensing charges are a tax and not a fee. The act of collecting the business licensing charges and appropriating the funds to cover the Department's and the State's general expenses constitutes a new tax without submitting it to a public vote in violation of TABOR. NFIB seeks declaratory and injunctive relief regarding the continued enforcement and maintenance of sections 24-21-104 and 24-21-104.5, C.R.S., and to abate and correct what it regards as the Defendants' unconstitutional actions.

On February 27, 2015, Defendants Wayne Williams, the Department, and the State (collectively "Defendants") moved to dismiss the complaint in its entirety. In this pleading, the Defendants make the following principal arguments: 1) The Department's charges for documents and other official work are fees and not taxes; 2) Assuming, for purposes of argument, that the Department's charges are taxes, the charges do not violate TABOR because they are not new taxes, tax rate increases, or part of a new tax policy; and 3) Reimbursements to county clerks under §24-21-104.5 do not violate TABOR because they enable the county clerks to assist the Secretary in the performance of his or her election-related duties.

Status: Soon after the filing of Defendants' motion to dismiss, the parties began to explore ways to streamline the litigation and achieve a more timely resolution of the dispute. Towards that end, in March and April 2015, the parties engaged in informal efforts to exchange information and reached an agreement on a list of stipulated facts for the purpose of filing cross-motions for summary judgment. In the interest of promoting streamlined proceedings, on May 1, 2015, Defendants withdrew their motion to dismiss.

On May 15, 2015, Defendants filed their answer to the complaint, generally denying the material allegations of the complaint and NFIB's entitlement to relief under its 3 claims for relief. In their answer, the Defendants also asserted a number of affirmative defenses, including the following: 1) The Department's charges for documents and other official work are fees, not taxes, because they defray the direct and indirect costs of the Department's services and general work; 2) To qualify as fees (rather than taxes), the Department's charges need not be strictly tied to the service for which the charge was imposed; 3) NFIB's interpretation of TABOR and requested relief would cripple the Department's ability to administer elections and would render the Department unable to provide other services that benefit the public, including NFIB's members and their employees; 4) Even if the

Department's charges are taxes, the charges do not violate TABOR because they are not new taxes, tax rate increases, or part of a new tax policy; and 5) NFIB's claims concerning conduct pre-dating FY 2011-2012 are time-barred by TABOR's four year statute of limitations.

The parties have agreed to proceed expeditiously to cross-motions for summary judgment. Under the briefing schedule for these motions that has been ordered by the Court, opening briefs are due June 30, 2015. Response briefs are due July 21, 2015. Reply briefs are due August 4, 2015. A hearing on the motions for summary judgment has been set for September 11, 2015. Trial will not be scheduled until the motions for summary judgment are resolved.

Counsel of record: NFIB is represented by Jason Dunn, Michael Hoke, and Emily Renwick from Brownstein Hyatt Farber and Schreck, LLP. The Defendants are represented by Leann Morrill, William Allen, and Kathryn Starnella of the Attorney General's Office.

Staff members monitoring the case: Sharon Eubanks and Bob Lackner

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g. 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, Civil Action No. 1:14 CV 00844.**

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 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; 3) Goldman, Sachs & Co.; 4) Bank of New York Mellon Trust Company, N.A.; 5) Fitch Ratings, Inc.; and 6) 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; 8) A lack of a right of private action for Colorado Open Records Act claims; 9) 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 10) Failure to sufficiently allege any violation of "disclosure duties". On September 22, 2014, Defendant Fitch Ratings, Inc., filed a separate motion to dismiss all claims against it on the ground that Plaintiff hadn't made any allegations against it with sufficient specificity to support a cause of action as a matter of law.

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: Plaintiffs filed a voluntary motion to dismiss the case, and the court issued an order granting the motion and dismissing the case on February 20, 2015. The litigation is therefore concluded.

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