SUMMARY OF LITIGATION AFFECTING THE COLORADO GENERAL ASSEMBLY AS OF JANUARY 15, 2016

OFFICE OF LEGISLATIVE LEGAL SERVICES

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I. Cases 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. The Court of Appeals conducted oral arguments in the case on October 6, 2015, and the parties are waiting for the Court's opinion.

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 the 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 Court in arriving at the correct resolution of the standing question presented. The Court ordered 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.

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 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.

Subsequently, a number of parties, including some Republican legislators and the states of Texas, Idaho, Indiana, and Michigan, filed amicus briefs with the Tenth Circuit. These amicus parties generally seek reversal of the underlying order of the U.S. District Court and dismissal of the case. The Tenth Circuit has scheduled oral arguments on January 21, 2016, at 8:30 am.

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 HB13-1249, 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 HB13-1249. 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 (section 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 requested an opportunity for oral argument, and the court heard oral argument on October 1, 2015. A decision from the court is pending.

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 the case: Jason Gelender

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d. *O'Connor v. Williams,* Denver District Court, Case No. 2015 CV 33643.

Status: On October 14, 2015, Darren O'Connor filed a second civil lawsuit against Representative Angela Williams in Denver District Court. O'Connor's complaint and jury demand generally details similar "facts" as alleged in the federal lawsuit, but asserts that Williams acted in her personal capacity rather than in her official capacity as a state legislator when she obtained a temporary, and sought a permanent, civil protection order against him and when she caused police officer to serve him with the temporary civil protection order and remove him from her House District 7 Democrats meeting. O'Connor alleges three claims for relief: 1) Abuse of process; 2) Malicious prosecution; and 3) Intentional infliction of emotional distress (outrageous conduct).

On December 4, 2015, Williams filed a motion to dismiss O'Connor's claims for failure to state a claim upon which relief can be granted pursuant to Colorado Rule of Civil Procedure 12 (b) (5). In the motion, Williams argues that: 1) O'Connor's abuse of process claim requires proof that Williams used a legal proceeding primarily to accomplish a purpose that it was not intended to achieve and that his complaint itself instead establishes that she used the civil protection order process for the precise purpose for which it was designed - to attempt to obtain a civil protection order; 2) O'Connor's malicious prosecution claim requires proof that Williams acted primarily for a purpose other than securing the proper adjudication of her claim when she sought a civil protection order, and his complaint itself and the attachments to the complaint establish that her actions were taken primarily for the purpose of obtaining a civil protection order; and 3) O'Connor's intentional infliction of emotional distress (outrageous conduct) claim requires proof of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, an utterly intolerable in a civilized community," and the allegations in his complaint, even if taken as wholly and indisputably true, do not rise to that level. The court granted O'Connor an extension of time to respond to Williams' motion to dismiss on December 9, 2015, and O'Connor filed an unopposed motion for a second extension of time on December 24, 2015. O'Connor has not yet filed a response to Williams' motion to dismiss and the court has not yet ruled on that motion.

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. The COLS retained Ed Ramey to defend Williams against O'Connor's federal lawsuit, which involves claims made against Williams in her official capacity, but she has retained Mr. Ramey herself for the state lawsuit, which involves only claims made against her in her personal capacity.

Staff member monitoring the case: Jason Gelender

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II. Cases 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: The union for the Denver classroom teachers appealed the decision by the Court of Appeals by filing a petition for a Writ of Certiorari with the Colorado Supreme Court. The court has not yet ruled on the petition.

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 the case: Jerry Barry

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ii. *Douglas County School District vs. Taxpayers for Public Education,* United States Supreme Court, No. 15-557, (Petition for a Writ of Certiorari from 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.

On October 28, 2015, the Douglas County School District filed a Petition for Writ of Certiorari with the United States Supreme Court. (Douglas County School Dist. v. Taxpayers for Public Education 15A269). The question presented by Douglas County is as follows:

"Can Colorado's Blaine Amendment, which the unrebutted record plainly demonstrates was born of religious bigotry, be used to force state and local governments to discriminate against religious institutions without violating the Religion Clauses of the first Amendment and the Equal Protection Clause of the Fourteenth Amendment?"

The Court permitted the filing of amicus briefs, and briefs supporting Douglas County's position were filed by the states of Arizona, Nevada, Ohio, Utah, Wisconsin, and Oklahoma, and United States Senator Cory Gardner, among others.

On November 15, 2015, the United States Supreme Court extended the time to file a response to the petition for writ to and including December 30, 2015.

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 the 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/Issue: 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.

On December 12, 2014, the plaintiffs filed an appeal of the trial court's dismissal order. On November 5, 2015, the Colorado Court of Appeals issued an opinion reversing the trial court and remanding the case back to the trial court with directions to reinstate the plaintiffs' complaint and conduct further proceedings.

The Court of Appeals found that the plaintiffs overcame the presumption that statutes do not create contractual rights and that the plaintiffs' impairment of contract claim can move forward to trial. The Court of Appeals agreed that there is no specific evidence to indicate that the TECDA creates a contract between a teacher and the school district. But the Court recognized as sufficient evidence a line of cases holding that the previous teacher employment statute did create such a contract. Even though the previous statute and the TECDA are not identical, the Court found that both statutes protect nonprobationary or tenured teachers from dismissal without cause and, therefore, the case law interpreting the previous statute applies to TECDA. Based on this case law, the plaintiffs have overcome the presumption that statutes do not create private contract rights. Therefore, at trial, the trial court must determine whether the plaintiffs can prove that the changes made to TECDA by S.B.191 substantially impair the contractual relationship and whether the impairment is justified because it is reasonable and necessary to serve an important public purpose.

The Court of Appeals also held that the plaintiffs can move forward with the claim that the S.B.191 provisions that allow a school district to place a nonprobationary teacher on indefinite unpaid leave violate constitutional due process requirements. The Court found that placing a teacher on indefinite unpaid leave is not the same as dismissing the teacher, so the teacher is not deprived of a property right. But, when a teacher is placed on unpaid leave, the teacher's expectation of continued employment is "disappointed" because the teacher is not working or getting paid. Based on a Colorado Supreme Court case interpreting the previous teacher employment law, a teacher who is placed on unpaid leave has a right to a hearing to determine whether the teacher was truly placed on unpaid leave for a reason authorized in the statute or whether the placement was made in an arbitrary or unreasonable fashion.

Status: The defendants filed a petition for a Writ of Certiorari with the Colorado Supreme Court on December 17, 2015. The Court of Appeals' remand order to the trial court is stayed pending Supreme Court review.

Counsel of record: Plaintiffs are represented by Kris A. Gomez and Brent R. Owen 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 the 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/Issue: 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 (section 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.

On September 21, 2015, the Supreme Court issued a 4-3 opinion holding that the negative factor does not violate the requirements of Amendment 23 and directing the trial court to dismiss the complaint.

Chief Justice Rice, writing for the majority, found that the plain language of Amendment 23 is clear: it requires the General Assembly to annually increase the amount of statewide base per pupil funding by inflation. Amendment 23 does not require the General Assembly to increase the total amount of per pupil funding for public education. The Court reviewed the history of public school funding since passage of Amendment 23, and explained the function of the negative factor. The Court recognized that the negative factor reduces the amount of total per pupil funding, but it does not reduce it so far as to affect the amount of base per pupil funding. Since Amendment 23 by its plain language requires only that the base per pupil funding increase, the negative factor, which reduces total per pupil funding, does not violate the Amendment 23 requirements.

Justice Marquez for the dissent argued that the plaintiffs presented sufficient facts to state a claim that the negative factor violates Amendment 23. Specifically, the dissent argued that the district court should have the opportunity at trial to consider plaintiffs' argument that, based on the school finance formula that was in effect when Amendment 23 passed, the voters expected that an increase in base per pupil funding would automatically increase total per pupil funding. When the General Assembly introduced the negative factor into the formula, it nullified the required increase to base per pupil funding and thereby violated the requirements of Amendment 23 and frustrated the voters' expectation and intent in passing Amendment 23.

Status: The case was remanded to the district court to dismiss the plaintiffs' complaint. By order dated October 22, 2015, the district court dismissed the lawsuit.

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 the 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]

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

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

[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).

electioneering communication "genuine issue speech" when an organization seeks action by government officials who also happen to be candidates.
The Institute aimed to raise funds for the specific advertisement from individual donors, independent of its general fundraising efforts for other programs. The Institute guards the privacy of its donors, wants to keep all donations for issue speech private, and therefore does not wish to disclose its donors on an electioneering communication report.

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

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

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

In its complaint, the Institute also sought injunctive relief.

Shortly after filing its complaint, the Institute filed a motion for a preliminary injunction. The parties subsequently asked the Court to consider the motion as one for summary judgment, allowing the Secretary of State ("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 United States 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 United States 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 December 18, 2015, no opinion has been issued.

Counsel of record: The counsel for the Institute is 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. **Energy**

i. ***State of West Virginia v. U.S. Envt'l Protection Agency, et al.*, Case No. 15-1363, United States Court of Appeals for the D.C. Circuit.**

Subject: Legality of the "Clean Power Plan" promulgated by the United States Environmental Protection Agency.

Background/Issue: On October 23, 2015, the EPA released its long-awaited "Clean Power Plan," a set of regulations under section 111(d) of the Clean Air Act[7] formally titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Unites," 80 Fed. Reg. 64,661. A consortium of states, including Colorado, immediately sought judicial review of the rules in the U.S. Court of Appeals for the District of Columbia Circuit.[8]

The states' petition for review became the lead case in a consolidated litigation involving a host of public and private entities, including coal and gas suppliers, electric utilities, wind and solar energy

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[7] 42 U.S.C. 7411(d).

[8] Colorado's participation came at the behest of Colorado Attorney General Cynthia Coffman, but without the support of Governor John Hickenlooper. Governor Hickenlooper sought a ruling from the Colorado Supreme Court on the propriety of the Attorney General's participation, but the court declined to accept jurisdiction. At this writing, it is unknown whether Governor Hickenlooper will pursue other legal action.

industry groups, environmental groups, and others, under the caption State of West Virginia, et al., Case No. 15-1363.

The grounds for the initial petition for review are that "the final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law."

Status: All parties were directed to submit nonbinding statements of the issues and, as of December 18, 2015, most, if not all, had done so. There is now pending a "Petitioners' Joint Motion to Establish Briefing Format and Expedited Briefing Schedule", and the date for oral argument has not been set.

Counsel of record: Colorado's counsel of record is Frederick R. Yarger, the Colorado Solicitor General. A full listing of the parties and their counsel of record is available through OLLS or from the Pacer website, http://pacer.psc.uscourts.gov.

Staff member monitoring the case: Duane Gall

d. Ethics

i. ***Gessler v. Grossman*, Colorado Supreme Court, Case No. 2015 SC 462, (Petition for a Writ of Certiorari from Colorado Court of Appeals, Case No. 14 CA 0268, which affirmed the judgment of 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 nonfrivolous. 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: 1) Allegations that do not concern violations of the gift or lobbying bans under Amendment 41; or 2) 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 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, section 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, section 24-9-105, C.R.S., 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.

On August 10, 2015, Gessler filed a petition for a Writ of Certiorari with the Colorado Supreme Court on the following questions:

1. Does the IEC have jurisdiction under the phrase "any other standard of conduct" in section 5 (1) of Article XXIX to penalize any public employee for violating any public law?
2. Is the phrase "other standards of conduct" in section 5 (1) of Article XXIX unconstitutionally vague?
3. Does procedural due process require pre-hearing notice to explain how laws are violated, or may notice simply list laws and reserve the right to add charges after the hearing?

The parties have fully briefed the petition for a Writ of Certiorari. As of December 18, 2015, the Colorado Supreme Court has not entered an order on the petition.

Counsel of record: In connection with the petition for a Writ of Certiorari, Gessler is represented by Michael Francisco and Michael R. Davis, Special Assistant Attorneys General. The IEC is represented by Attorney General Cynthia Coffman and by Russell Klein, Lisa Brenner Freimann, and Natalie Lucas of the Attorney General's Office.

Staff members monitoring the case: Jennifer Gilroy and Bob Lackner

ii. *Colorado Ethics Watch v. Independent Ethics Commission*, Colorado Supreme Court Case No. 15-SA-244 (appeal from Denver District Court, Case No. 2015 CV 031862).

Subject: Whether the dismissal of a complaint by the Independent Ethics Commission is "final action" subject to judicial review.

Background/Issue: On March 24, 2014, Colorado Ethics Watch ("CEW") filed a complaint (the "Rowland Complaint") with the Independent Ethics Commission ("IEC" or "Commission") against

Elbert County Commissioner Robert Rowland. The Rowland Complaint alleged that Commissioner Rowland cast the deciding vote to authorize the Elbert County Attorney to appeal an administrative law judge's fine against him personally. CEW alleged that this conduct violated a state statute that requires a county commissioner (among other elected officials) from taking official action that would provide a direct financial benefit to him or her, and to disclose the existence of a personal financial interest, recuse from voting, and refrain from attempting to influence the outcome of the vote.

The IEC initially voted to stay its review of the Rowland Complaint under a Commission Rule giving it the authority to stay its review of a complaint when the same subject of the complaint is pending before another body. On March 9, 2015, the Commission voted unanimously to lift the stay and directed its Executive Director to conduct a preliminary investigation of the Complaint under IEC Rule 7.F, while continuing to maintain the confidentiality of the complaint until a frivolous determination could be made.[9] On May 11, 2015, the Commission met in executive session to discuss the Complaint in order to maintain the confidentiality required by Section 5 (3) (b) of Article XXIX of the state Constitution ("Article XXIX") if the complaint were determined to be frivolous. Thereafter, the Commission entered into open session and voted 3-2 to dismiss the Complaint as frivolous. On May 15, 2015, the IEC notified CEW that the Rowland Complaint is frivolous pursuant to Commission Rule 7.G.1, as there was "no basis in fact or in law for the Commission to assert its jurisdiction."

On May 26, 2015, CEW filed a complaint against the Commission ("CEW Complaint") in Denver District Court. The CEW Complaint asserts two claims for relief. Under its first claim for relief, CEW seeks judicial review of agency action under section 24-4-106 (7)[10] of the state Administrative Procedures Act ("APA"). The second claim for relief alleges a violation of C.R.C.P. 106.[11] As a factual predicate to the assertion of both claims, CEW alleges in its Complaint that the Commission's determination that the Rowland Complaint is frivolous is "clearly erroneous, arbitrary and capricious, contrary to constitutional right, power, privilege, or immunity, or contrary to law, and must be reversed." CEW seeks an order under section 24-4-106 and C.R.C.P. 106 holding unlawful and setting aside the Commission's determination that the Rowland Complaint is frivolous and compelling the IEC to proceed with an investigation, a public hearing, and entry of findings of fact and conclusions of law regarding the matters discussed in the CEW Complaint.

On June 16, 2015, the IEC through its counsel, the Attorney General's Office, filed a motion to dismiss the CEW Complaint. In its motion to dismiss, the IEC argues that its decision to dismiss a

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9 Under Section 5 (3) (b) of Article XXIX of the state constitution, the IEC may dismiss frivolous complaints without conducting a public hearing. This same constitutional provision also requires complaints dismissed as frivolous to be maintained confidential by the Commission. Rule 7.F allows the Commission in relevant part to determine whether a complaint is frivolous. Alternatively, the Commission may defer a frivolous determination until after a preliminary investigation of the complaint by Commission staff. If, after a preliminary investigation, the Commission is unable to determine whether the complaint is frivolous, Rule 7.F authorizes the IEC to disclose the complaint to the individual who is the subject of the complaint for his or her response in order to aid the Commission in determining whether the complaint is frivolous.

10 Section 24-4-106 (7), C.R.S., requires the court to set aside agency action that it finds to be "arbitrary or capricious, a denial of a statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations [of the APA] or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion…unsupported by substantial evidence…or otherwise contrary to law…".

11 C.R.C.P. 106 (a) (4) offers a plaintiff judicial relief where "any governmental body…has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy, or adequate remedy otherwise provided by law."

frivolous complaint is not final action subject to judicial review. Specifically, the Commission argues that the dismissal of the complaint is not "final action" because the dismissal neither involves an adjudication of rights or obligations nor do any legal obligations flow from the dismissal of the complaint. The fact that the state Constitution requires the Commission to keep frivolous complaints confidential reinforces the conclusion that the dismissal of a frivolous complaint is not subject to judicial review. Where final action does not exist, there is no right to judicial review under either the APA or under C.R.C.P. 106. As an additional ground to dismiss the CEW Complaint, the Commission alleges that CEW was neither adversely affected nor aggrieved and lacks standing under both the APA and C.R.C.P. 106.

IEC further argues that the state Constitution vests the Commission with the authority to determine whether a complaint is frivolous. If the Commission determines that a complaint is frivolous, neither the voters nor the General Assembly intended for any person or party to have appeal rights from that decision.

On July 6, 2015, CEW filed its Opposition to Motion to Dismiss. In this pleading, CEW asserted that the dismissal of the Rowland Complaint is a final action. The IEC's suggestion that no legal consequences flow from a dismissal of its complaint is absurd. Specifically, the dismissal of the Rowland Complaint has had the legal consequence of depriving CEW of an investigation, a public hearing, and the entry of findings after the public hearing. Moreover, CEW has established it enjoys proper legal standing by showing that it has been denied a public hearing to which it is entitled.

CEW also argues that, even without enactment of section 24-18.5-101 (9), C.R.S., which makes final action on a complaint subject to judicial review in state court, it would have the right to challenge the IEC's wrongful dismissal of its complaint because the complaint seeks to enforce the terms of a self-executing constitutional amendment. In addition, CEW's interest in public release of the "preliminary investigation" is independently sufficient to establish standing. Finally, the confidentiality requirement does not foreclose judicial review. On this point, CEW argues that an order restricting public access to court files would fully satisfy IEC's confidentiality obligation while permitting judicial review to go forward. The IEC's duty to maintain frivolous complaints as confidential cannot be read to preclude judicial review of erroneous dismissals.

On July 13, the IEC filed its Reply to the Opposition to the Motion to Dismiss.

By written order dated July 21, 2015, the Denver District Court denied the Commission's Motion to Dismiss. The Court initially found that the dismissal of the Rowland Complaint by the IEC "as frivolous was a final action—it left nothing more to be done, other than the ministerial task of maintaining the complaint as confidential." IEC had further argued that an appeal would interfere with its duty to maintain confidentiality. The Court held that this concern can be addressed through an appropriate suppression order. It does not support deeming the dismissal as a nonfinal action.

On the standing question, the Court concluded that, having had its Complaint declared frivolous, CEW was "'injured in fact' in that its complaint was dismissed." Further, CEW was injured because it incurred the expenses of initiating the complaint but not the benefit of a hearing on the merits. The intended effect of Article XXIX would be diminished if a complainant could not challenge a dismissal whether deemed frivolous or otherwise. Public respect and confidence would be lessened, not promoted. Thus, CEW's alleged injury was to a legally protected interest under the constitution.

On September 11, 2015, the IEC filed a petition with the Colorado Supreme Court pursuant to C.A.R. 21 for a rule to show cause as to why the CEW Complaint should not be dismissed. The IEC argues that requiring it to respond to said complaint and file a record on review will require the Commission to litigate a matter in which the District Court lacks subject matter jurisdiction and will violate the Commission's duty to maintain the confidentiality of frivolous complaints. Article XXIX and the Commission's implementing statute do not permit judicial review of the Commission's decision to dismiss a frivolous complaint.

The Commission seeks an order from the Supreme Court holding that Article XXIX does not permit judicial review of the Commission's dismissal of a frivolous complaint, that such a dismissal is not a reviewable final action under section 24-18.5-101 (9), C.R.S., and that CEW is not "adversely affected or aggrieved" by the Commission's actions under section 24-4-106, C.R.S., of the APA.

Among other arguments raised in its petition, the IEC asserts that the plain language of Article XXIX evinces the voters' intent that there be no subsequent scrutiny of any dismissed frivolous complaint. Judicial review of a dismissed complaint would forgo the confidentiality protection specified in the state constitution and allow the names and allegation to be revealed to the reviewing court contrary to the plain language of Article XXIX. Further, neither a claim for relief under C.R.C.P. 106 nor a claim for judicial review under section 24-4-106, C.R.S., displace the more specific provisions of Article XXIX and the Commission's implementing statute.[12] Like other administrative bodies in Colorado, the IEC is vested with discretion to decide which complaints should be dismissed as frivolous and which complaints the Commission should investigate, hold a public hearing, and render findings. When the Commission makes a decision *not* to initiate formal, public enforcement proceedings, that decision is not subject to judicial review.

Status: On September 17, 2015, the Supreme Court issued an order to show cause as to why the complaint of CEW should not be dismissed. The parties subsequently briefed the matter. Oral argument on the rule to show cause has been set for January 26, 2016.

Counsel of record: The IEC is represented by Attorney General Cynthia Coffman and by Frederick Yarger, Lisa Brenner Freimann, and Kyle Dumler of the Attorney General's Office. CEW is represented by Luis Toro and Margaret Perl from its own staff.

Staff member monitoring the case: Bob Lackner

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e. Income Tax/Conservation Easements

i. *Gentz et al. v. Colorado Department of Revenue, et al.*, Case No. 2015 CV 030034, Logan County District Court.

Subject: Did the adoption in 2011 of a phased approach to resolving conservation easement tax credit disputes constitute an ex post facto law to the extent that the approach is used to resolve disputes arising from credits claimed prior to that date? Does an instrument creating a conservation

[12] Section 24-18.5-101, C.R.S.

easement need to include extinguishment and proceeds language in order for the easement to be considered perpetual and therefore eligible for the state conservation easement income tax credit?

Background/Issue: Colorado law allows a state income taxpayer to claim a tax credit for a portion of the value of a perpetual conservation easement that the taxpayer donates to certain governmental or charitable organizations. Alan and Julia Gentz donated conservation easements on their properties in 2006 and 2007, and claimed credits for them on their income tax returns for those years.

In September of 2008, the Department of Revenue (DOR) sent the Gentzes a letter disallowing their tax credit claim for the 2007 easement. Over the next 6 years, DOR and the Gentzes exchanged a number of notices and protests, ultimately resulting in the validity of the tax credit claims for both easements being at issue.

The parties formally commenced the administrative hearing process to resolve the disputed claims in August of 2014. DOR moved to proceed with a "phased approach" to the hearing process. The phased approach, adopted in accordance with the provisions of HB11-1300, commences with a first phase that only considers the validity of the easements at issue. The valuation of the easements, the amount of tax due, and other issues are addressed in later phases. Although the Gentzes objected, the hearing officer granted DOR's motion to proceed with the phased approach.

The parties then filed motions to dismiss and for summary judgment. The hearing officer granted DOR's motion for summary judgment, finding both the 2006 and 2007 easements invalid because the instrument creating them did not contain certain language regarding the potential extinguishment of the easements and the disposition of any proceeds resulting from any such extinguishment. Because of this, the hearing officer ruled that the easements were not perpetual, had no value, and therefore did not qualify for the income tax credit. This appeal to the Logan County District Court followed.

On appeal, the Gentzes are asserting six claims for relief, which are all tried de novo with the Logan County District Court determining all relevant issues of law and fact. The first claim for relief challenges the finding of the hearing officer that the extinguishment and proceeds language was required in order for the easements to be considered perpetual. The second claim for relief asserts that the use of the phased approach in resolving the dispute constitutes an unconstitutional application of an ex post facto law because it was not in place at the time the Gentzes donated their conservation easements in 2006 and 2007.

The other claims: 1) Dispute the zero valuation of the easements; 2) Allege that the hearing officer exceeded his jurisdiction under C.R.C.P. 106(a)(4); 3) Assert that DOR's actions constituted an unconstitutional taking of the Gentzes' property without just compensation; and 4) Allege that the State and Logan county have been unjustly enriched by receiving the benefits of the easements without providing any tax benefit to the Gentzes.

Status: The DOR filed a motion to dismiss all but the Gentzes' first claim for relief. The trial court heard the motion on September 1, 2015, and has taken the motion under advisement.

Counsel of record: The Gentzes are represented by Andrew T. Flynn, Eric B. Leibman, Jack W. Berryhill, and Rebecca B. DeCook of Moye White LLP, and Lori C. Hulbert and Julie Noonan of Hulberth & Associates LLC. The Colorado Department of Revenue is represented by Noah C. Patterson, Terence C. Gill, and Kathleen L. Spalding of the Attorney General's office.

Staff member monitoring the case: Gregg Fraser

f. 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 ("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.[13]

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.

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

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; and (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 United States Supreme Court issued an opinion on March 3, 2015, remanding the case back to the Tenth Circuit Court of Appeals on the merits. The 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 were held on September 29, 2015. As of December 18, 2015, the Tenth Circuit has not entered an order on the matter.

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 arguments were heard by the Tenth Circuit on January 21, 2015. On July 13, 2015, the Tenth Circuit issued its opinion affirming the judgment of the district court. Subsequently, the plaintiffs filed a petition for a Writ of Certiorari with the United States Supreme Court. The petition was denied on December 7, 2015.

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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g. 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 United States 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 December 18, 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.

Plaintiff's voluntary motion to dismiss. The plaintiff moved to voluntarily dismiss the case on November 19, 2015, after accepting monetary settlement from the various defendants. The court granted the motion to dismiss and the case is concluded.

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. The plaintiffs filed a brief in opposition to the motion to dismiss on June 26, 2015, and the state filed a reply brief on July 13, 2015. As of December 18, 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 United States Supreme Court regarding the constitutionality and enforcement of Amendment 64. The Supreme Court has original jurisdiction to hear cases involving one state versus another state. The 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 United States 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 United States 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 include language that explicitly authorizes 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 explicit 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 explicitly 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.[14]

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

[14] 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.

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.

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.

On June 18, 2015, several days prior to the District Court's Order denying the Cities' Motion for Preliminary Injunction, the Adams County BOCC filed a Motion to Dismiss. The District Court ultimately converted the Motion to Dismiss into a Motion for Summary Judgment with the agreement of all of the parties.

In its Motion to Dismiss, the Adams County BOCC sought an order upholding the legality of its special marijuana tax because it is specifically authorized under Colorado law and was imposed pursuant to a lawful vote of the people. The Adams County BOCC argued that the authorizing legislation in section 39-28.8-203 (1) (a) (VI), C.R.S., is plain and unambiguous and specifies that local governments, including counties, are not prevented from imposing, levying, and collecting a tax on the sale of retail marijuana. The Adams County BOCC further argued that there is no requirement that the legislature use specific language when granting taxing authority and the fact that one grant of authority is not written in the same way as another does not negate the clear authorizing language in the statute.

On July 9, 2015, the Cities filed a Response to the Adams County BOCC's Motion to Dismiss and Plaintiff's Motion for Summary Judgment. The Cities sought an Order declaring that the special marijuana tax is void ab initio and enjoining the Adams County BOCC from further collection of the special marijuana tax. The Cities argued that the state and cities are expressly authorized to levy a special tax on retail marijuana and that, even though the General Assembly has expressly authorized counties to levy special taxes in some situations, it has not done so with retail marijuana sales. Section 39-28.8-203 (1) (a) (VI), C.R.S. specifies that nothing in the distribution mechanism of the revenues from the state special sales tax on retail marijuana shall be construed to "prevent" a local government from imposing, levying, and collecting a tax on the sale of retail marijuana. The Cities argue that this language is not synonymous with language authorizing counties to impose a special retail marijuana sales tax. In addition, there is no statutory provisions regarding how a county would collect and enforce a special retail marijuana sales tax and the Cities argued that such provisions are required for an entity to levy a tax.

The issue before the District Court was whether section 39-28.8-203 (1) (a) (VI), C.R.S., grants counties the authority to tax retail marijuana and retail marijuana products. In a September 23, 2015, order, the District Court held that the plain language of the statute is clear and is not susceptible to more than one reasonable interpretation. The District Court found that when read in conjunction with the statutory definition of "local government" which includes counties and the statutory provision authorizing the state to levy a special sales tax on retail marijuana, the statute authorizes counties to levy a tax on the sale of retail marijuana or retail marijuana products.

On October 16, 2015, the Cities filed a Notice of Appeal. The issue that the Cities raised on appeal is whether the District Court erred in finding that the Adams County BOCC has the statutory authority to enact, collect, and enforce a retail marijuana sales tax within its boundaries in the absence of specific statutory authority to impose or collect such a special sales tax on retail marijuana.

On October 28, 2015, the Adams County BOCC filed a Notice of Cross Appeal. The issue that the Adams County BOCC raised on appeal is whether the District Court erred when it found that the Cities had standing in this case.

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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h. Powers of the Attorney General

i. *In Re Hickenlooper v. Coffman*, Colorado Supreme Court, Case No. 15 SA 296.

Subject: Whether Colorado's constitution and laws allow the Attorney General to sue the United States Government on behalf of the State of Colorado without the authorization of the Governor.

Background/Issue: On November 4, 2015, Governor John Hickenlooper asked the Colorado Supreme Court to exercise its original jurisdiction and issue a rule requiring State Attorney General Cynthia Coffman to show cause that she has the authority under the Colorado constitution and laws to file a lawsuit against the United States Government on behalf of the State of Colorado without the authorization of the Governor to file such lawsuit. The Governor sought a declaration from the Court that: 1) The Governor, not the Attorney General, has ultimate authority to decide on behalf of the State of Colorado whether to sue the federal government; and 2) The Attorney General's lawsuits against the federal government without the Governor's authorization must be withdrawn.

Attorney General Coffman then requested that the Colorado Supreme Court allow the Attorney General to file a brief addressing whether the Governor's petition satisfies the requirements for invoking the Court's original jurisdiction. The Court granted the Attorney General's request and established a briefing schedule for the Attorney General's brief and a response brief by the Governor. Briefing was completed on November 25, 2015.

On December 3, 2015, the Colorado Supreme Court declined to exercise its original jurisdiction in this matter and rejected the Governor's request for a rule to show cause. In choosing not to hear the matter, the Court stated that there is an "adequate alternative remedy" for the two parties to settle the dispute.

Status: This matter has been concluded.

Counsel of record: Governor Hickenlooper was represented by Sean Connelly and Daniel M. Reilly of Reilly Pozner LLP. Attorney General Coffman was represented by the Attorney General's Office.

Staff members monitoring the case: Sharon Eubanks and Jen Berman

i. TABOR

i. ***TABOR Foundation v. Colorado Bridge Enterprise,*** **Colorado Supreme Court, Case No. 14 SC 766 (Petition for certiorari from Court of Appeals, Case No. 2014 CA 106, which affirmed the judgment of the 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)[15].

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

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

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. 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.

On June 29, 2015, the Colorado Supreme Court denied certiorari, and this case is now concluded.

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 the 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.

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 its favor.

CUT appealed the judgment to the Colorado Court of Appeals, and on November 5, 2015, the Court of Appeals affirmed the trial court's judgment. The Court concluded that Aspen intended to use the revenue from the charge to finance a particular class of services related to the reduction of waste and to pay for related education, and that it did not matter that not everyone paying the charge would take advantage of those services. In addition, the fee was not raised to defray general city expenses. Finally, the court stated that the TABOR preference for an interpretation that most restrains the growth of government only applies where multiple interpretations of TABOR are equally supported by the facts, which was not the case, and even if it did apply, CUT failed to establish that its interpretation would restrain governmental growth the most. For these reasons, the

Court held that the charge was a fee and not a tax, and that TABOR's prior voter approval requirement does not apply to it.

Status: On November 8, 2015, CUT filed a motion for rehearing with the Colorado Court of Appeals which the Court has not yet ruled upon.

Counsel of record: CUT is represented by Jeffrey W. McCoy 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.

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.

Status: On April 8, 2015, the TABOR Foundation filed a Notice of Appeal with the Colorado Court of Appeals. Opening and response briefs have been filed, and the TABOR Foundation's reply brief is due on December 17, 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 ("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. Subsequently, Defendants elected to dismiss their appeal. On August 25, 2015, the Court entered an order voluntarily dismissing the appeal. The case is now concluded.

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 section 24-21-104.5, C.R.S., 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 agreed to proceed expeditiously to cross-motions for summary judgment. The parties submitted their briefing on the cross-motions for summary judgment during the summer of 2015. Oral argument was held on the motions for summary judgment on September 11, 2015.

By order dated November 3, 2015, the District Court granted summary judgment in favor of the Defendants. The first issue addressed by the Court was whether the Department's primary funding provision as codified in section 24-21-104, C.R.S., is a tax or fee. The first factor to be assessed in making this determination under controlling case law is the language of the enabling statute at the time of the enactment. With respect to this factor, the Court concluded that the primary purpose of the business and licensing charges at issue is solely to finance the Department's services and operations. Thus, under this factor, the charges should be classified as fees.

The second factor is the primary purpose for which the money is raised. Under this factor, the Court held that the business and licensing charges finance the Department's services and operations. This factor also supports classifying the charges as fees.

The Court then analyzed whether the primary purpose of the charge is to finance or defray the cost of the services provided to those who pay it. Here, based on the record before it, the Court found that the business and licensing charges are not being used primarily to defray or finance the cost of services provided to those who pay the charges. In this case, the business and licensing charges are being levied primarily for the purpose of defraying the costs of various Department services that are not closely related to the particular services provided to those who pay the charges. Accordingly, under this third and final factor, the charges should be classified, at least in part, as taxes.

The Court noted that the current case law is not clear on how to weigh the three factors if all do not support classification as a fee versus a tax. Nevertheless, the Court declined to resolve the issue because even if categorized as a tax, the Court found that the business and licensing charge are not subject to TABOR.

TABOR is prospective in application; therefore, it does not extend to taxes or tax policies in place prior to its enactment. Section 24-21-104, C.R.S. was enacted in 1983, nine years before TABOR. Thus, the statute can only be subject to TABOR if its subsequent implementation constitutes either a tax policy or rate change directly causing a net revenue gain.

The Court concluded that a tax structure enacted before TABOR is not subject to TABOR if, for example, subsequent adjustments to the tax are set by a statutorily-prescribed formula. Here, adjustments are at the Secretary's discretion but still must approximate the Department's direct and indirect costs. The business and licensing charges have funded the vast majority of the Cash Fund since the statute was enacted and there is no evidence to indicate a major discrepancy has developed recently between the business and licensing charges and the services provided by the Department. The Court concluded that the Secretary's periodic adjustments to the business and licensing charges do not constitute a change to the "high level overall plan" contained in the statute. Any revenue generated by the Department's charges is statutorily-limited to being used only for the Department's official work. The business and licensing charges are required to be deposited into a Cash Fund separate from the State's General Fund. The Department is required to adjust the charges so that revenue generally approximates the overall costs of its operations for each fiscal year. In this way, the charges are part of a pre-set formula that is not a tax rate change and does not result in a net revenue gain to the State.

The Court concluded that, although finding the vast majority of the Department's budget through charges to "small business" is arguably unfair, it is consistent with the manner in which the Department has operated for many years. NFIB has failed to demonstrate that the business and licensing charges constitute a change in tax policy or a tax rate resulting in a net tax revenue gain to the State. Therefore, the Court concluded that NFIB failed to meet its burden of showing beyond a reasonable doubt that the statutory provisions setting the business and licensing charges are unconstitutional in violation of TABOR.

NFIB had also argued that certain statutes that require the Department to reimburse county clerks for conducting general elections and November odd-year elections in which at least one statewide ballot issue is on the ballot ("Reimbursement Statutes") are also unconstitutional under TABOR. The Court concluded that the required reimbursements are not subsidizing general county government expenses but are defraying the cost of an offshoot of the Department's responsibilities. The Department is not reimbursing county clerks for elections generally nor does the Department reimburse county clerks for other services that are not election related. Although the Reimbursement Statutes were enacted after TABOR, the reimbursements to county clerks for election services are directly related to the Department's longstanding official work. As a result, the Court held that the statutes constituted neither an increase in tax rates nor a change in tax policy. Further the Reimbursement Statutes do not create a new tax or generate new revenue. The statutes adjust or allocate the charges for election functions. As such, the reimbursements are fairly considered adjustments to the pre-TABOR policy. Accordingly, the Court found that NFIB failed to meet its burden of showing beyond a reasonable doubt that the Reimbursement Statutes are unconstitutional in violation of TABOR.

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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vi. ***TABOR Foundation v. Colorado Department of Health Care Policy and Financing, et al.,* United States District Court for the District of Colorado, Civil Action No. 2015 CV 32305.**

Subject: Status of the hospital provider fee (HPF) as a fee or a tax for purposes of TABOR voter approval requirements.

Background/Issue: In 2009, the General Assembly enacted legislation authorizing the Department of Health Care Policy and Financing (HCPF) to impose a hospital provider fee (HPF) on outpatient and inpatient services provided by hospitals for the purpose of obtaining federal matching money under the state medical assistance program and the Colorado indigent care program. The legislation was not referred to the voters of the state for their approval. The state uses HPF revenue to match federal money so that it can increase reimbursement to hospitals for program services, cover more individuals with public medical assistance, and defray its own administrative costs of implementing and administering the HPF program. The federal regulation that makes a state eligible for federal matching money if it imposes a HPF, describes a HPF as a "permissible health-care related tax", and, subject to waiver provisions, requires a HPF to be "broad based", "uniformly imposed", and "generally redistributive". TABOR requires voter approval of new taxes, but does not require voter approval of new fees.

The TABOR Foundation (Foundation), a nonprofit organization that describes itself as being "dedicated to protecting and enforcing TABOR on behalf of its members," filed a complaint against HCPF, the executive director of HCPF, the Colorado Department of the Treasury, and the State Treasurer (Defendants) in Denver District Court on June 26, 2015, alleging that the HPF is actually a tax, not a fee, for purposes of TABOR, and that the state has therefore violated TABOR by imposing it without first obtaining voter approval,. The complaint alleges separate claims for relief for: 1) Fiscal year (FY) 2010-11; 2) FYs 2011-12 and 2012-13; and 3) Ongoing unconstitutional taxation. The specific grounds for the Foundation's claims are that the HPF is "generally redistributive and did not guarantee to fund any service utilized by the hospitals which paid the charge," and that some HPF revenue and federal matching money have been used to offset general fund expenditures. The Foundation seeks declaratory and permanent injunctive relief against the imposition of the HPF until voters approve it and, as required by TABOR, a refund of all HPF revenue collected in violation of TABOR since FY 2010-11 plus ten percent simple interest.

The Defendants filed a motion to dismiss the complaint on September 2, 2015, on the grounds that: 1) The Foundation does not have legal standing to file the complaint because the only "taxpayers" who could be injured by the alleged imposition of the HPF without voter approval are the hospitals who pay the HPF, none of which are parties to the lawsuit; 2) The Foundation failed to state a claim upon which relief can be granted because as a matter of law the HPF is a fee, not a tax, for purposes of TABOR; and 3) The Department of the Treasury and the State Treasurer are not proper parties because their duties with respect to the HPF are purely ministerial.

Defendants specifically argue that the HPF is a fee because: 1) Its primary purpose is to finance a particular service to hospitals, a reduction in the amount of uncompensated health care services that they provide, by increasing compensation for those services and reducing the number of uninsured patients; 2) The amount of the HPF is reasonably related to the costs of providing the service as evidenced by hospitals generally, as well as most individual hospitals, receiving benefits that substantially exceed the amount of fees paid; 3) Federal regulations requiring HPFs to be generally redistributive only prohibit the state from guaranteeing that the amount of increased payments made to any given hospital be directly tied to the amount of the HPF paid by the hospital and do not convert the fee into a tax; 3) The use of federal matching money to offset general fund spending for the Medicaid program does not convert the HPF into a tax, and the federal funds are exempt from TABOR regardless; and 4) The use of HPF revenue to offset general fund spending for the Medicaid program does not convert the HPF into a tax.

On October 9, 2015, the Foundation filed a brief opposing the motion to dismiss and requested oral argument. In the brief, the Foundation asserts that it has taxpayer standing on behalf of its members because TABOR "provides a legally protected enforceable interest to all taxpayers" and that it can prove that the HPF is a tax because it "does not provide a particular service to those who must pay the charge, but instead is a redistributive tax that finances a particular service for some hospitals at the expense of other hospitals." The brief also argues that the Department of the Treasury and State Treasurer are proper parties because a judgment in favor of the Foundation would require the Treasurer, acting through the Department, to refund general fund revenue to the taxpayers.

On October 16, 2015, the Defendants filed a reply brief in support of their motion to dismiss. The reply brief, relying on documents attached by the Foundation to the complaint, notes that when HPF fees are broken down by hospital organization, rather than by individual hospitals, each organization received more in supplemental payments than it paid in HPFs and reiterates and clarifies its arguments supporting the conclusion that the HPF is a fee, not a tax. Finally, Defendants argue that the methods to be used to fulfill an obligation to refund money to taxpayers if the Foundation prevails are to be determined by the General Assembly, that the Department of the Treasury and the State Treasurer would have purely ministerial obligations to execute any such refund, and that they therefore are not necessary parties.

Status: The Defendants' motion to dismiss the Foundation's claim is pending. The court has not yet scheduled oral argument or ruled on the motion.

Counsel of record: Steven Lechner and Jeffrey McCoy of the Mountain States Legal Foundation represent the Foundation. Cynthia Coffman, Jennifer Weaver, and W. Eric Kuhn of the Attorney General's Office represent the Defendants.

Staff member monitoring the case: Jason Gelender

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j. Urban renewal

i. ***M.A.K. Investment Group LLC v. City of Glendale and Glendale Urban Renewal Authority*, United States District Court for the District of Colorado, Civil Action No. 15-cv-02353-RBJ-NYW.**

Subject: The constitutionality of Colorado's Urban Renewal Law, both facially and as applied, arising out of a blight determination made by the city of Glendale and the Glendale Urban Renewal Authority concerning Plaintiff's property.

Background/Issue: Plaintiff M.A.K. Investment Group LLC ("MAK") owns certain real property located in Glendale, CO ("MAK Property"). The principals of MAK have operated a family business—an independent rug store—on the property.

MAK's complaint in this action alleges that on or around April 5, 2013, the City of Glendale ("City") provided to MAK the Riverwalk Urban Renewal Plan Notice ("Plan Notice") which specified that, in May 2013 it would hold a hearing to consider the recommendation of the Glendale Urban Renewal Authority ("Authority") that the City approve the Riverwalk Urban Renewal Plan ("Plan") pursuant to the provisions of the state's Urban Renewal Law ("URL"). MAK alleges that the Plan Notice failed to state that a blight determination, if made by the Authority, will be the basis for government to take private property under the power of eminent domain. Nor did the Plan Notice state that property owners will have, according to MAK's complaint, only one chance to challenge a blight determination and must do so by filing a lawsuit within 30 days of the blight determination. The complaint alleges that a principal of MAK met with a representative of the City at which time the City failed to advise MAK that a blight determination could be used as the basis for taking property by eminent domain and that MAK's only opportunity for challenging the blight determination would be a lawsuit filed 30 days after the public hearing. Instead, the City advised MAK that there was no need for it to take any action.

On May 7, 2013, the Glendale City Council ("Council") conducted a hearing. The complaint alleges that principals of MAK did not attend the hearing both because they did not understand the significance of the public hearing for the future possible condemnation of its property and they had been assured by the City there was no need to attend the hearing.

MAK alleges that, had it realized the significance of the public hearing, it would have organized others in the community against it and either stopped the urban renewal project entirely or delayed it.

On May 7, 2013, the Council passed a resolution declaring that the MAK Property was a blighted area. On May 12, 2015, the Council passed a resolution authorizing the Authority to acquire the MAK Property by the power of eminent domain if necessary in furtherance of the City's May 2013 blight determination.

On or about October 23, 2015, MAK filed a complaint against the City and the Authority (collectively, "Defendants") in the United States District Court for the District of Colorado. In its complaint, MAK alleges, among other things, that as a result of the City's May 2013 blight determination, and the City's failure to provide MAK sufficient notice to satisfy constitutional due process, MAK has suffered damage—namely, the blight determination has created a cloud of condemnation and otherwise acted as a stain on the MAK Property, thereby limiting its marketability and MAK's quiet title and beneficial enjoyment of the Property.

MAK's complaint alleges that the URL allows a condemnor to acquire real property from private parties without requiring the government to first notify the owners of the purpose for or consequence of a proposed blight determination or the extremely narrow 30-day window to seek judicial review of such a determination. This is contrary to procedural due process requirements that a person be provided individual notice and an adversarial hearing before a neutral arbiter before the start may take private property. The complaint goes on to allege that, because the City did not provide MAK with due process, MAK did not know to challenge the designation within 30 days and lost the chance to judicially challenge the legality of the blight determination, a precursor of the City's taking of its property. MAK alleges that, as a result of this deprivation of procedural due process, it incurred significant injury, namely, the ability to meaningfully challenge the constitutionality and proposed legality of the blight designation that now clouds title to the MAK Property and serves as the precursor to the potential condemnation of the same.

MAK's first claim for relief alleges that it has been deprived of its right to procedural due process under 42 U.S.C. section 1983. Under this claim, MAK alleges that the URL is unconstitutional on its face because it does not require notice of processes sufficient to meet the demands of the Due Process Clause of the Fourteenth Amendment to the United State Constitution. This claim alleges that the City and its agents and employees, acting under color of state law, violated MAK's constitutional due process rights in contravention of the Fourteenth Amendment by giving MAK inadequate notice of the initial blight determination hearing, conducting a hearing that lacked necessary procedural safeguards, and failing to provide any notice that the City had designated its property as blighted. Unless Defendants are enjoined from continuing to designate MAK's property as blighted, MAK will continue to suffer great and irreparable harm.

MAK's second claim for relief alleges that it has been deprived of its rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. section 1983. Under this claim, MAK alleges that owners whose property is taken pursuant to the URL are afforded substantially less due process protection than is afforded to property interests in other contexts. As such, the law treats similarly situated persons differently. These two tiers of due process protection allegedly consigned MAK, an owner of property condemned under the URL, to a subordinate status, thereby depriving it of the equal protection of the laws as guaranteed by the United State Constitution.

Among other things, MAK requests entry of judgment declaring that the URL is unconstitutional both facially and as applied to it.

On November 17, 2015, the Defendants moved to dismiss MAK's Complaint under F.R.C.P. 12 (b) (1) (lack of subject matter jurisdiction) and 12 (b) (6) (failure to assert a claim upon which relief can be granted) alleging that its claims fail as a matter of law for various reasons. With respect to MAK's procedural due process claim, first, because a finding of blight is a legislative determination, no procedural due process rights arise. A determination that an area is blighted involves a policy decision of general applicability and is not an adjudication of individual rights. Such a decision is, therefore, legislative under Colorado law. Because it is legislative, no right to procedural due process arises when the decision is made. Second, a procedural due process claim may only be asserted if MAK was deprived of an identifiable property interest and MAK has no property interest in a discretionary determination of blight. Third, even if MAK were found to have a property interest giving rise to judicial review (and even if the decision were not found to be legislative), that right is satisfied by the Colorado statutory scheme. Specifically, MAK must be notified of its right to judicial review of the blight determination and have some kind of hearing on that determination before its property is finally taken through condemnation proceedings. The Colorado statutory mechanism provides for just that form of due process protection. The statutory mechanism for judicial review of the blight determination is not in fact the sole opportunity for judicial review; rather, if and when condemnation proceedings are ever instituted with respect to the MAK Property, MAK will have notice and an opportunity for judicial review of the blight determination at that time. No further process is due it.

Because the Colorado statutory process provides for notice and for an opportunity for judicial review of the blight determination before final deprivation of property, Defendants assert that it is not unconstitutional either on its face or as applied, and the procedural due process claim must be dismissed.

With respect to MAK's equal protection claim, Defendants assert that it is not ripe and, therefore, must be dismissed. Specifically, no final decision has been made as to MAK's use of the property; the blight determination is a preliminary step and condemnation may or may not occur in the future. Nor has MAK yet had an opportunity (or any reason) to avail itself of a claim for compensation as it has a right to do under Colorado law. Defendants similarly argue that MAK's procedural due process claim is also not ripe and must be dismissed. Such a claim is not ripe until the property owner has made a claim for compensation and been denied.

Defendants also assert that MAK's equal protection claim fails to sufficiently allege that a similarly treated class was treated differently. A claim of equal protection fails as a matter of law where it does not allege facts about any particular person or persons who were treated differently from plaintiff's class. Here. Defendants assert that MAK's Complaint fails to allege any facts to show that a similarly situated class exists or that it was treated differently from Plaintiff's class. The equal protection claim must therefore be dismissed.

On December 11, 2015, MAK filed its Response in Opposition to Defendants' Motion to Dismiss. Defendants' plan to file a Reply in Support of Motion to Dismiss on or before December 28, 2015.

Status: Briefing on the Motion to Dismiss is still ongoing.

Counsel of record: MAK is represented by Timothy Atkinson, Russell Kemp, and James Silvestro of Ireland Stapleton Pryor and Pascoe, P.C., and by R. Alexander Pilmer of Kirkland & Ellis LLP. The City and the Authority are represented by Michael Zwiebel, Jason Astle, Jeffrey Springer, and Matthew Giacomini of Springer and Steinberg, P.C.

Staff member monitoring the case: Bob Lackner

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k. Water Quality

i. ***North Dakota v. U.S. Environmental Protection Agency*****, United States District Court for the District of North Dakota, Civil Action No. 3:15 CV 00059.**

Subject: Whether the rule promulgated by the Environmental Protection Agency (EPA) and Corps of Engineers (COE) that defines the term "waters of the United States", as used in the "Federal Water Pollution Control Act" (Act) to identify the waters subject to the Act, is valid.

Background/Issue: The Act provides that the discharge of pollutants into navigable waters from a point source requires a permit issued by EPA and that the discharge of dredged or fill material into navigable waters requires a permit issued by COE. The Act defines "navigable waters" as "waters of the United States, including the territorial seas". Because the statutory definition is ambiguous, the agencies promulgated a rule to provide more detail.

The validity of the regulatory definition has been litigated numerous times, and the United States Supreme Court has ruled on the issue several times. The most recent case, *Rapanos v. United States*, 547 U.S. 715 (2006), did not succeed in clarifying the situation:

> All members of the Court agreed that "navigable waters" encompassed something more than traditional navigable-in-fact waters. There was no majority opinion, with five justices concluding that remand was necessary for consideration of whether the wetlands at issue in *Rapanos* were "navigable waters" covered by the Act and whether the EPA and the Corps had impermissibly extended their regulatory jurisdiction under the Act. Justice Scalia wrote the plurality opinion, joined by three other justices; Justice Kennedy wrote a concurring opinion; and Justice Stevens wrote the dissenting opinion, joined by three other justices.
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> The plurality opinion limits federal authority over "navigable waters" to "those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands . . ." The plurality test requires two findings:
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>> First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.
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> In his concurring opinion, Justice Kennedy rejected these two requirements as "unduly dismissive of the interests asserted by the United States in these cases" and recognized that the rationale for the Act's regulation of wetlands is the functions that wetlands perform in relation to the integrity of other waters--"functions such as pollutant trapping, flood control, and runoff storage." Accordingly, Justice Kennedy determined that the government's jurisdiction under the Act extends to wetlands that:
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>> possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made. . . [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of the covered waters more readily understood as "navigable."
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> A wetland would not satisfy Justice Kennedy's test if its effect on water quality were speculative or insubstantial. Justice Kennedy also concluded that if the wetland is adjacent to navigable-in-fact waters, then the Corps "may rely on adjacency to establish its jurisdiction."

United States v. Bailey, 571 F.3d 791, 797, 798 (8th Cir. 2009) (internal citations omitted).

After implementing the *Rapanos* standard--in particular Justice Kennedy's formulation--without an updated rule for almost a decade, the agencies decided to repromulgate the rule to clarify the scope of their jurisdiction under the Act. The agencies promulgated the final rule on June 29, 2015. Briefly, the rule defines "waters of the United States" to include tributaries of navigable waters, waters adjacent to navigable waters and tributaries, waters determined (on a case-by-case basis) to have a significant nexus to navigable waters, and waters within the 100-year floodplain or ordinary high water mark. The rule includes numerous definitions of these key terms and also specifically excludes certain waters, including ditches and other nonnatural water features.

Status: Litigation was promptly filed in numerous federal district courts throughout the country, as well as in several federal courts of appeal. The appellate litigation has been consolidated in the Sixth Circuit Court of Appeals. The defendants have filed motions in the district court cases to consolidate the district court litigation, but the Judicial Panel on Multi-District Litigation has not yet ruled on the motion, and while most of the district court judges have stayed the proceedings in their courts pending that ruling, the judge in this case did not.

In this case, the plaintiffs are 12 states, the New Mexico Environment Department, and the New Mexico State Engineer, and the defendants are the two federal agencies. The complaint asserts six claims: 1) The rule exceeds the agencies' authority under the Act; 2) The rule extends the agencies' authority beyond the limits of the federal constitution's commerce clause; 3) The rule violates state sovereignty reserved under the federal constitution's Tenth Amendment; 4) The Corps violated the procedural requirements of the National Environmental Policy Act (NEPA) in issuing its Finding of No Significant Impact regarding the proposed promulgation of the rule; 5) The rule is arbitrary and capricious in violation of the Administrative Procedures Act (APA); and 6) The agencies violated the procedural requirements of the APA in promulgating the rule.

The plaintiffs filed a motion for a preliminary injunction against implementation of the rule, which the court granted on August 27, one day before the effective date of the rule. The court held that the plaintiffs had established a likelihood of success in their claims regarding violations of NEPA and the APA and, applying the analysis established in *Rapanos*, the Act. While it was originally unclear whether the injunction applied nation-wide or only in the 13 states that had sued, the court later issued an order clarifying that the injunction applies only in the 13 litigating states, which includes Colorado.

In early October, the Sixth Circuit Court of Appeals issued a nation-wide stay on the implementation of the rule pending determination of its jurisdiction to determine the multi-district litigation. *Ohio v. Unites State Army Corps of Engineers*, 803 F.3d 804 (6th Cir. 2015). In early November, the North Dakota court refused to issue a stay of its proceedings, ruling that the impact of the multi-district litigation could be considered later.

Counsel of record: The plaintiffs are represented by the Attorneys General of the states of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, New Mexico, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; the defendants are represented by the United States Attorney General.

Staff member monitoring the case: Thomas Morris