SUMMARY OF LITIGATION AFFECTING THE COLORADO GENERAL ASSEMBLY AS OF APRIL 12, 2017

OFFICE OF LEGISLATIVE LEGAL SERVICES

Table of Contents

I. Cases in Which the General Assembly, Staff Agency, or Member named as Party

a. Kerr, et al. v. Hickenlooper....3

b. O'Connor v. Williams (state court case)....7

c. In the Matter of State Board of Great Outdoor Colorado Trust Fund and Dianne E. Ray in Her Official Capacity as the Colorado State Auditor v. State Board of Great Outdoors Colorado Trust Fund....10

d. Hill, et al. v. Williams, et al....13

II. Cases of Interest to Members of the General Assembly

a. Alcohol Regulation

i. Denver Neighborhood-Supported Social Consumption Committee, et al. v. Colorado Department of Revenue and Brohl....17

b. Criminal Law

i. Nelson v. Colorado....18

c. Education

i. Denver Classroom Teachers Association v. School Dist. No. 1....19

ii. Douglas County School District v. Taxpayers for Public Education....21

iii. Masters v. School Dist. No. 1....25

iv. Thomas, et al. v. Douglas County Board of Education....28

d. Elections

i. Independence Institute v. Williams....29

e. Energy

i. State of West Virginia v. U.S. Environmental Protection Agency....32

ii. State of Colorado v. Boulder County....33

f. Environmental Remediation

i. New Mexico v. Colorado....34

g. Ethics

i. Gessler v. Grossman....36

h. Income Tax/Conservation Easements

i. Gentz, et al. v. Colorado Department of Revenue, et al....39

ii. Landowners United Advocacy Foundation v. State of Colorado....41

i. Interstate Commerce

i. Direct Marketing Ass'n v. Brohl....42

j. Marijuana Legalization

i. Justin E. Smith, et al., v. Hickenlooper....47

ii. The City of Northglenn, et al., v. Board of County Comm'nrs of Adams County....48

k. TABOR
   i. Colo. Union of Taxpayers Foundation v. City of Aspen 54
   ii. TABOR Foundation v. Regional Transportation Dist., et al...........................56
   iii. National Federation of Independent Business v. Wayne Williams, Colorado Department of State, and the State of Colorado...57
   iv. TABOR Foundation v. Colorado Department of Health Care Policy and Financing, et al. 60

l. Urban Renewal
   i. M.A.K. Investment Group LLC v. City of Glendale and Glendale Urban Renewal Authority..62

m. Water Quality
   i. North Dakota v. U.S. Environmental Protection Agency................................66

I. Cases in which either the General Assembly, a legislative staff agency, or a member of the General Assembly is a named party:

a. *Kerr, et al. v. Hickenlooper*, No. 12-1445 (10th Circuit July 19, 2016).

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

Background/Issue: On or about May 23, 2011, State Representative Andy Kerr and 34 other named Plaintiffs, including four other current members of the General Assembly,[1] commenced a lawsuit against the state of Colorado in United States District Court for the District of Colorado alleging that TABOR, section 20 of article X of the Colorado Constitution, violates the Guarantee Clause, other provisions of the federal constitution, and specified federal statutory provisions. On or about June 15, 2011, Plaintiffs filed an amended complaint naming Governor Hickenlooper the sole Defendant (in his official capacity).

Specifically, the Plaintiffs' claims allege that:

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

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

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

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

5. In depriving the General Assembly of the power to tax, TABOR nullifies the inherent and necessary powers of the General Assembly under section 2 of article X[2] and sections 31 and 32 of article V of the Colorado Constitution[3] and, consequently, violates both those "superior" provisions of the Colorado Constitution and the Guarantee Clause. As part of this claim, Plaintiffs allege that any amendment to the Colorado Constitution must be read as subordinate to the "superior" obligation of the state to maintain a republican form of

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

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

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

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.

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

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

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

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

The Defendants subsequently sought an interlocutory appeal of the District Court's order on the motion to dismiss with the Tenth Circuit Court of Appeals. The Tenth Circuit granted this request

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

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

The District Court has stayed the litigation pending consideration of the interlocutory appeal. Oral argument in the interlocutory appeal took place before a panel of the Tenth Circuit on September 23, 2013. 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 Tenth Circuit 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 ("*Arizona Legislature*"). On July 31, 2015, the parties filed supplemental briefs addressing whether the ruling of the Supreme Court in the *Arizona Legislature* case required the Tenth Circuit to reconsider its previous decision. The parties filed their supplemental response briefs by August 20, 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 sought reversal of the underlying order of the U.S. District Court and dismissal of the case. The Tenth Circuit heard oral arguments on January 21, 2016.

Status: The Tenth Circuit took a second look at the case to consider the effect of the Supreme Court's opinion in *Arizona Legislature*. In that case, the Supreme Court had distinguished individual legislators from a legislature as an institution for claims challenging a legislature's power. By order dated June 3, 2016, the Tenth Circuit concluded that this rule of law materially alters the jurisprudence on legislator standing such that the nature of the injury – whether it is personal or institutional – is a primary consideration in determining whether individual legislators may bring suit. Under *Arizona Legislature*, the Tenth Circuit concluded that the legislator-plaintiffs assert only an institutional injury and, therefore, lack standing to bring this action. The Tenth Circuit vacated the District Court's order and remanded the case to the District Court so that the Court could make the initial determination regarding the standing of plaintiffs who are not legislators.

On July 19, 2016, the Tenth Circuit denied Plaintiffs' petition for a rehearing on the June 3, 2016, order.

On October 3, 2016, Plaintiffs filed their Third Amended Substitute Complaint for Injunctive and Declaratory Relief. In their amended complaint, Plaintiffs deleted some plaintiffs from the last substitute complaint filed in June 2011, and added as new plaintiffs both a number of individuals as well as several public bodies, including a board of county commissioners, 5 boards of education, and a recreational district. In this amended complaint, the Plaintiffs assert the same claims as in their substituted complaint filed in June, 2011. The prayer for relief seeks the same relief as in the substituted complaint filed in June 2011.

On or about December 1, 2016, Plaintiffs filed their Fourth Amended Substitute Complaint for Injunctive and Declaratory Relief ("Fourth Complaint"). Although Plaintiffs largely present the same legal claims in their Fourth Complaint as in their Third Complaint, they have updated their list of Plaintiffs, and added as new Plaintiffs 3 additional school boards.

On December 16, 2016, Governor Hickenlooper moved to dismiss Plaintiffs' Fourth Complaint on the grounds that the Court lacks subject-matter jurisdiction to hear the case because no Plaintiff has standing. Under that broad argument, the Governor asserts that the Political Subdivision Plaintiffs do not have standing. Moreover, Plaintiffs cannot establish the necessary elements of Article III standing to proceed with their claims because none of Plaintiffs' alleged injuries are concrete and particularized and Plaintiffs cannot establish that TABOR caused their alleged injuries or that any such injuries would be redressed by the relief they seek. The Governor also argues that principles of prudential standing also bar Plaintiffs' claims.

On February 14, 2017, Plaintiffs filed their Brief in Opposition to Defendant's Motion to Dismiss.

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 was represented by Maureen Witt and Stephen Masciocchi of Holland and Hart LLP, but the General Assembly is no longer actively participating in this matter.

Staff members monitoring the case: Sharon Eubanks and Bob Lackner

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b. *O'Connor v. Williams,* No. 2015 CV 33643 (Denver District Court).

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 and activity without being retaliated against and is civilly liable under state law for abuse of process, malicious prosecution, and intentional infliction of emotional distress/outrageous conduct.

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 (and now Senator) 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 a 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. That case is no longer pending and was resolved entirely in favor of Williams as the U.S. District Court granted Williams' motion for summary judgment, the Tenth Circuit Court of Appeals affirmed, and O'Connor did not seek any additional legal remedy within the deadlines for doing so. The details of the federal civil rights lawsuit were included in previous versions of this "Summary of Litigation" and can be provided upon request.

On October 14, 2015, O'Connor filed a civil lawsuit against Williams in Denver District Court. O'Connor's complaint and jury demand generally details similar "facts" as alleged in the federal lawsuit discussed above 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 argued 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.

On January 11, 2016, O'Connor filed a response to Williams' motion to dismiss, arguing that his complaint sufficiently alleged: (1) Abuse of process because it alleged that Williams had an ulterior purpose of preventing O'Connor from engaging in protected political speech and political activity when she sought a civil protection order, that Williams used the civil protection order legal process for a purpose, impeding political participation, for which it was not designed, and that O'Connor suffered damages by having his constitutional rights infringed and being forced to pay an attorney to defend him in the civil protection order proceedings; (2) Malicious prosecution because it alleged that Williams sought a civil protection order to silence O'Connor's political activities and had no probable cause to seek the order for a legitimate purpose and thus was knowingly initiating baseless litigation; and (3) Intentional infliction of emotional distress/outrageous conduct because it alleged that Williams sought a civil protection order to silence political speech and activity, which satisfies the legal standard for outrageousness, and further alleged that the manner in which Williams caused police to serve the civil protection order on O'Connor was intended to and did cause O'Connor severe emotional distress. On January 19, 2016, Williams filed a reply in support of her motion to dismiss, that briefly reiterated the arguments made in the motion to dismiss.

On February 3, 2016, the Denver District Court denied Williams' motion to dismiss in an order that briefly recited case law holding that "motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted under notice pleadings" and finding, without further explanation, that "[p]laintiff has sufficiently pled a claim for abuse of process, malicious prosecution and intentional infliction of emotional distress." On February 17, 2016, Williams filed an answer to O'Connor's complaint. On July 13, 2016, the parties met for mediation in hopes of settling the case, but did not reach a settlement.

On September 12, 2016, Williams filed a motion for summary judgment on the grounds that: (1) O'Connor's abuse of process claim is legally insufficient because Williams invoked the civil protection order process for the proper purpose of obtaining a civil protection order and did not use it in any way not proper to the regular conduct of a civil protection order proceeding; (2) The undisputed facts of the case, including both the Magistrate's findings that Williams "genuinely feels harassed and intimidated by O'Connor's, frankly, relentless attempts to meet with her," that Williams "was clearly concerned about her personal space; and that Williams had "already taken proactive . . . measures to ensure her personal safety and enhance her comfort level" and Williams' demonstrated willingness to adjust any protective order that might have been granted to accommodate O'Connor's advocacy and First Amendment rights make O'Connor's malicious prosecution claim unprovable as a matter of law; and (3) Even accepting all of O'Connor's factual allegations as true, Williams'

actions do not satisfy the high legal standard of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community required to establish a claim of intentional infliction of emotional distress/outrageous conduct." O'Connor has since filed and been granted several unopposed motions for extensions of time to respond to the motion and has not yet filed a response. On October 3, 2016, O'Connor filed an unopposed motion to vacate and reset trial, and the Court granted the motion and rescheduled the trial, which had been scheduled to begin on December 12, 2016, for June 5, 2017. On December 16, 2016, counsel for O'Connor conducted a deposition of Williams.

Status: By order dated March 15, 2017, the District Court granted Williams' motion for summary judgment and vacated the trial date. On Plaintiff's abuse of process claim, the District Court held that there was no use of a legal proceeding in an improper manner and Williams' request for a civil protection order ("CPO") was not devoid of factual support or a cognizable basis in law. Accordingly, Plaintiff failed to state a valid claim for abuse of process. The Court also held that summary judgment was appropriate on Plaintiff's malicious prosecution claim. Because Plaintiff cannot prove absence of probable cause for pursuing the CPO, this claim also fails as a matter of law.

Finally, the District Court also concluded, as a matter of law, that Williams' pursuit of the CPO does not constitute outrageous conduct and would not excite outrage in the average person. Given Plaintiff's conduct, Williams' response in seeking a CPO or in resisting Plaintiff's claims in the earlier federal case are insufficient as a matter of law to state a claim for outrageous conduct. Williams' conduct simply does not rise to the level of atrociousness necessary to support a claim for outrageous conduct.

Given these findings and rulings, the Court also denied as moot Plaintiff's request to amend his complaint to add a claim for punitive damages.

As of the date of this summary, it is not clear whether Plaintiff will appeal the Court's order granting summary judgment.

Counsel of record: Darold Killmer of Killmer, Lane & Newman LLP represents O'Connor. Ed Ramey of Heizer Paul LLP represents Williams. The COLS retained Ed Ramey to defend Williams against O'Connor's federal civil rights lawsuit, which involved claims made against Williams in her official capacity and has been resolved in Williams' favor, 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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c. ***In the Matter of State Board of Great Outdoors Colorado Trust Fund,* No. 2016 CV 32003 (Denver District Court) and *Dianne E. Ray in Her Official Capacity as the Colorado State Auditor v. State Board of Great Outdoors Colorado Trust Fund*, No. 2016 CV 032395 (Denver District Court).**

Subject: Whether State Auditor Dianne Ray ("State Auditor") may require the State Board ("Board") of the Great Outdoors Colorado Trust Fund ("GOCO") to submit to a performance audit that will be conducted by the Office of the State Auditor ("OSA").

Background/Issue: Under section 6 (3) of article 27 of the state constitution ("Article 27"), the Board is "subject to annual audit by the state auditor, whose report shall be a public document." By letter dated January 13, 2016, the OSA commenced a performance audit of GOCO and sent the Executive Director of GOCO an engagement letter to be executed by GOCO that specified the terms of such audit. The purpose of the performance audit is to provide objective analysis to assist management and those charged with governance and oversight in using the information to improve program performance and operations, reduce costs, facilitate decision-making by parties with responsibility to oversee or initiate corrective action, and contribute to public accountability. On January 26, 2016, the State Auditor issued an initial request for information and documents to the Board in furtherance of the performance audit. Since then, the Board has refused or failed to submit to the performance audit (and to subsequent requests for information) based on the belief that the State Auditor lacks the authority to conduct a performance audit of the Board and that the Board has no legal duty to be subjected to the performance audit she commenced. The Board concedes that the State Auditor has the legal authority to conduct a financial audit of its operations but alleges that the State Auditor does not possess the legal authority to conduct a performance audit of is operations. By letter from its legal counsel, dated April 28, 2016, GOCO expressed its position that OSA's authority to audit GOCO is restricted to a financial audit and proposed an alternative to a performance audit.

On or about June 2, 2016, after several weeks of discussion between the parties failed to resolve their differences, pursuant to section 33-6-113, C.R.S., the Board commenced an action in Denver District Court by filing a verified petition ("the Petition") for judicial examination of and determination of a power conferred to the Board by Article 27, namely, its power to decline to participate in, and refuse to be subjected to, a performance audit by OSA. The petition alleges that Articles 5 and 27 of the state constitution, when read together, confirm that GOCO has the power to decline to participate in, and refuse to be subject to, a performance audit by the OSA and that the OSA has no authority to conduct a performance audit of GOCO. In the Petition, GOCO concedes that it is subject to a financial audit by the OSA.

On or about July 6, 2016, the State Auditor moved to dismiss the Petition under CRCP 12 (b) (1) and 12 (b) (5) and asserted 2 arguments for dismissing the Petition: 1) As a political subdivision of the state, the Board does not have standing to sue the Auditor; and 2) Section 33-60-113 ("Section 113") is an inappropriate vehicle to seek a judicial determination of whether the State Auditor may conduct a performance audit of the Board.

With respect to its first argument, the State Auditor points to long standing legal principles holding that a subordinate political subdivision is not permitted to challenge the scope of the power of a superior state official or agency. Here, for purposes of the constitutionally mandated "annual audit" of the Board, the State Auditor is expressly positioned as a superior state official in relation to the Board, which is "subject to" her audit power. As a result, the Board is not permitted to seek judicial review of the State Auditor's actions with respect to the type of annual audit to which it must submit. However, in the Petition, the Board does precisely that, asking the Court for a declaration that the State Auditor does not have the power to conduct a performance audit. Because the Board

lacks standing to assert this claim, the Court lacks jurisdiction to consider the Petition and, accordingly, must dismiss it.

As an additional argument for dismissing the Petition, the State Auditor argues that the statutory section that supports the action of the Board, Section 113, is an improper procedural vehicle to resolve a dispute between the Board and the State Auditor over the scope of her powers. Section 113 prescribes certain procedural rules that govern such action, noting that the examination and determination "shall be conducted in substantially the manner set forth in section 32-4-540, CRS." Section 32-4-540 (1) (b) ("Section 540"), in turn, specifies that "[s]uch action shall be in the nature of a proceeding in rem….". However, an *in rem* action is an action determining title to property. It stands in contrast to an action brought against a person. Here, no property interest is in dispute as the case solely concerns the State Auditor's power to conduct a performance audit of the Board.

In addition, Section 113 by its own terms does not cover a dispute about the State Auditor's powers. Section 113 permits the Board to file a petition for judicial determination in connection with only 3 expressly enumerated subjects: 1) Any power conferred to the Board; 2) Any revenue-raising power exercised by the Board; or 3) Any act of the Board relating to the issuance of bonds. The lawsuit does not implicate any of these 3 subjects. Even with respect to the first subject, which is arguably the most open-ended with respect to the Board's powers, this dispute does not involve a power conferred to the Board at all; rather, it is about a power conferred to the State Auditor. The Board tries to get around this statutory requirement by seeking a determination whether its power includes the power to decline to participate in or be subject to a performance audit. However, the constitutional provision on which the Board relies does not expressly confer or even imply any "power" to avoid State and public scrutiny; it does exactly the opposite by imposing an affirmative legal duty on the Board to submit to an annual audit by a state official.

The State Auditor goes on to argue that the Board's interpretation of Section 113 contradicts the statute's plain language. To describe the Board's alleged right to refuse to participate in a performance audit as a "power" would expand Section 113 to cover every conceivable legal dispute it might have: The Board could always reframe a dispute as a question about whether it has the "power" to reconcile that dispute in a particular way. This interpretation cannot be reconciled with the text of Section 113, which authorizes the Board to ask for a judicial determination in connection with only three expressly enumerated subjects, none of which is implicated in this lawsuit.

In addition, the State Auditor argues that the Board cannot avoid the political subdivision standing doctrine by shoehorning the dispute into a procedural vehicle that is explicitly limited to a small class of *in rem* disputes that are not at issue here. For all these reasons, the Petition should be dismissed.

On or about July 6, 2016, the State Auditor commenced her own lawsuit against the Board. In this lawsuit, the State Auditor asserts two claims: 1) A writ of mandamus under CRCP 106 (a) (2) seeking a judicial order compelling the Board to submit to a performance audit commenced by the State Auditor on January 13, 2016; and 2) In the alternative, pursuant to CRCP 57 and section 13-15-101, CRS, the State Auditor seeks a) A declaration of the scope of her power to conduct a performance audit as her "annual audit" of the Board and the Board's duty to submit to the same; and (b) An order enjoining the Board from further refusing or failing to submit to the performance audit commenced by the State Auditor on January 13, 2016.

Status: The State Auditor brought a motion to consolidate the 2 actions and, on August 11, 2016, the 2 cases were consolidated. On September 26, 2016, the District Court granted a Joint Motion to Stay Proceedings for a period of 14 days to allow the parties to engage in settlement discussions.

On October 11, 2016, the District Court entered an order granting the State Auditor's Motion to dismiss the Petition. In the order granting the motion, the District Court made the following determinations: 1) The State Auditor has standing under §32-4-540, C.R.S., to move to dismiss the Petition, both as an actual party and as an interested party; 2) The Political Subdivision Standing Doctrine applies to the dispute between the Board and State Auditor and the Board cannot challenge the action of a superior state agency; 3) A plain reading of Section 113 and Section 540 allow the Board the ability to petition for judicial determination based on powers conferred to it. Moreover, the powers conferred to the Board are stipulated in the Constitutional article and provisions that created the Board. Nowhere in section 6 of Article XXVII does the Board have the power to decide which audits to take part in or refuse to take part in. Upon reading the constitutional provisions and subsections, along with Sections 113 and 540, the Court found that the Board does not have the power to decide or refuse to participate in an audit performed by the State Auditor. Finally, the State Auditor had argued that Section 113 applied only to in rem proceedings based on its correlation to Section 540. But the Court found that Section 113 does not only apply to in rem proceedings.

As part of the order granting the motion to dismiss the Petition, the Court granted GOCO's motion for extension of time to respond to the complaint and further directed GOCO to file an answer or other response to the State Auditor's Complaint within 10 days of the order.

By letter dated October 14, 2016, GOCO, through its Chairman Jason Brinkley, advised the Legislative Audit Committee that GOCO "has informed State Auditor Dianne Ray that GOCO will fully cooperate with the performance audit." In a companion letter dated that same date, GOCO's Executive Director James Spaanstra informed the State Auditor that GOCO "look[s] forward to working collaboratively with the OSA on a 2016 performance audit."

On October 21, 2016, the Board filed its Answer and Affirmative Defenses to the State Auditor's complaint in the companion lawsuit.

The OSA has resumed its performance audit of GOCO. The State Auditor has requested, and was granted by the Court on October 24, 2017, a stay of proceedings in the companion lawsuit she filed against the Board until March 31, 2017.

Counsel of record: The Counsel for the Board is Stephen Masciocchi, Gregory Goldberg, and Kathleen Kuster of Holland & Hart LLP. The State Auditor is represented by LeeAnn Morrill and Christopher Jackson of the Attorney General's office.

Staff member monitoring the case: Bob Lackner

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d. Hill, et al. v. Williams, et al., No. 16-CV-02627 (United States District Court for the District of Colorado) and Harlos et al. v. Morrissey, et al., No. 16-CV-02649 (United State District Court for the District of Colorado).

Subject: The constitutionality under the First Amendment to the United States Constitution of a Colorado statute that prohibits a voter from taking a photograph of the voter's completed ballot, commonly known and referred to as a "ballot selfie".

Background/Issue: Section 1-13-712 (1), C.R.S. prohibits a voter from "show[ing] his ballot after it is prepared for voting to any person in such a way as to reveal its contents. Any person who violates the statute is guilty of a misdemeanor and can be punished by a fine of not more than $1,000 and/or by imprisonment in the county jail for not more than 1 year. See §1-13-712 (4). The prohibition has been a part of Colorado law since 1891.

On October 20, 2016, Denver District Attorney Mitch Morrissey issued a news release reminding Denver voters that there is a state law prohibiting voters from showing their completed ballot to others, which prohibition includes posting one's completed ballot on social media. The news release stated that the prohibition on sharing a completed ballot is an effort to guard against potential voter fraud.

Plaintiffs wished to take photographs of their completed ballot and post them on social media but believed §1-13-712 prevented them from doing so.

On October 24, 2016, Plaintiffs State Senator Owen Hill and Scott Romano filed a Verified Complaint for Declaratory and Injunctive Relief and Motion for Preliminary Injunction against Colorado Secretary of State Wayne Williams and Colorado Attorney General Cynthia Coffman, both in their official capacities (hereafter referred to as the "2627 Action"). On November 1, 2016, the Plaintiffs in the 2627 Action amended their complaint to add an additional plaintiff and Denver District Attorney Morrissey, in his official capacity, as an additional defendant. On October 25, 2016, Plaintiff Caryn Ann Harlos and 2 other individuals filed a Verified Complaint for Declaratory and Injunctive Relief and Motion for a Temporary Restraining Order and Preliminary Injunction against the same 3 defendants (hereafter referred to as the "2649 Action").

In the 2627 Action, Plaintiffs sought a preliminary injunction enjoining Defendants from enforcing §1-13-712 (1) against the photographing of one's own ballot and the display of photographs outside of polling places. In the 2649 Action, Plaintiffs sought a preliminary injunction "prohibiting Defendants from having Plaintiffs arrested, having Plaintiffs summonsed, or prosecuting Plaintiffs or any similarly situated individuals for engaging in constitutionally protected conduct that violates [§1-13-712 (1)]."

The parties fully briefed Plaintiffs' Motions for Preliminary Injunction. On November 3 and 4, 2016, the Court held a two-day evidentiary hearing on the motions.[5]

In response to Plaintiffs' Motions for Preliminary Injunction, Defendants submitted various affidavits and declarations from representatives of the Colorado Attorney General's office and several district attorneys' offices generally stating that the particular office would not charge a voter with a violation of §1-13-712 (1) unless there is evidence the act was in connection with another

[5] Although the cases were filed separately and have not been consolidated, because the 2 cases involve the same issues and the Court held a joint evidentiary hearing, the Court issued a single opinion addressing both cases.

elections code offense, such as vote buying, vote selling, coercion, or another type of undue influence.

Defendants contended as a threshold matter that Plaintiffs lack standing to pursue the case. The Court disagreed. Even assuming arguendo that there is no credible threat of future prosecution, Plaintiffs have established an injury in fact necessary to demonstrate standing by showing an objectively reasonable fear of "other consequences following from the statute's enforcement." Plaintiffs demonstrated numerous "other consequences" stemming from enforcement of the law, including deleterious professional responsibility. While District Attorney Morrison avers that he will not prosecute any cases under §1-13-712, he has not assured the Court or the Plaintiffs that he will refrain from an invasive investigation or coercive request that violators delete their ballot posts, both of which could chill the exercise of First Amendment right to speech. In consideration of the foregoing, the Court found that Plaintiffs demonstrated a sufficient injury in fact to establish standing.

Defendants next argued the case is moot. Here, the Court noted that, under controlling authority, indicia of reluctant cessation by government recommend against a decision to moot a suit. In this case, the Court interpreted Defendants' steadfast commitment to the constitutionality of the underlying statute, in spite of their averments disclaiming prosecution, as evidence of reluctant cessation. For this reason, and for the legitimate uncertainty concerning whether harms could be repeated in subsequent elections, the Court declined to find the case moot.

Defendants' next argument is that the Court should not grant any injunctive relief because such an order would alter existing election laws and procedures just before an election. In response, the Court heeded the Supreme Court's warning in *Purcell v. Gonzalez,* 549 U.S. 1 (2006), not to disrupt imminent elections by narrowly crafting its injunction and refusing to enjoin the Secretary of State. Specifically, the Court narrowly tailored its injunction to ensure that it did not alter existing election laws or rules. Moreover, its order did not enjoin the Secretary of State in any way and its injunction did not affect procedures or rules at polling places. If local rules at polling places prohibit the use of cameras due to privacy concerns, nothing in the Court's order prohibits the enforcement of those rules.

In order to secure a preliminary injunction, a movant must demonstrate: 1) irreparable injury will result if the injunction does not issue; 2) a substantial likelihood of success on the merits; 3) the threatened injury to the movant outweighs any damage the injunction may cause the opposing party; and 4) issuance of the injunction would not be adverse to the public interest.

With respect to the first factor, concerning irreparable injury, the Court noted that, where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed. In this case, Plaintiffs alleged they have silenced themselves under threat of criminal penalties and that, if an injunction is not issued, it will result in only further irreparable harm. Thus irreparable harm is presumed. Further, Plaintiffs have suffered irreparable harm because they have had their free speech rights chilled. In addition to the evidence concerning Plaintiffs themselves, evidence was presented that other Coloradoans have likewise had their speech chilled.

In terms of the next factor, a substantial likelihood of success on the merits, the Court made an initial determination that the question before it is whether §1-13-712 (1) is sufficiently narrowly tailored to serve the governmental interest in reducing the risk of vote fraud, including vote buying,

vote selling and voter intimidation. The Court noted that the statute prohibits a wide range of activities related to the publication of the contents of a filled-in ballot, regardless of whether that publication has anything to do with voter fraud. Further, the declarations made by the defendants in an effort to defeat standing and render the case moot – that Plaintiffs will not be prosecuted for posting ballot selfies absent additional evidence that such conduct violates another provision of other election laws – are concessions that violations of the statute alone (in the absence of violations of another section of the election code) pose no material public concern. The Court also noted that the General Assembly has passed other laws that address the governmental interest in question and do so in a constitutional manner.[6] For these reasons, the Court found that Plaintiffs have demonstrated a substantial likelihood of success on the merits.

In considering the balance of harms, the Court weighs the irreparable harm to the moving party with the harm an injunction would cause the opposing party. Here, in the evidentiary hearing, the only harm identified by the Deputy Secretary of State from entry of an injunction is that her office may have to field more calls concerning the effect of the injunction and the current state of the law. The Court found that the harm created by extra phone calls to the Secretary of State does not outweigh the First Amendment rights of the citizens of Colorado. There is no harm to the public in precluding enforcement of §1-13-712 (1). Indeed, the defendants conceded as much when they indicated an intention not to prosecute ordinary violations of the statute. In such circumstances, the balance of harms tips strongly in favor of Plaintiffs.

The final determination to be made by the Court is whether the public interest would be served by entering the preliminary injunction. By issuing an injunction, the Court held that the public gets what it is entitled to—clarity on an issue that implicates fundamental constitutional rights. Thus, the Court found that granting the injunction is in the public interest.

The Court therefore ordered that Defendants Morrissey and Coffman, in their official capacities, are enjoined from enforcing §1-13-712 (1) by prosecuting, referring for prosecution, and/or investigating violations of the statute, or instructing any person to remove from publication any photograph or image of the person's voted ballot, unless the violations or publication are in connection with violations of other criminal laws. Nothing in the order alters the ability of the Defendants or other officials to enforce any other laws or rules related to the administration of the election, including those rules in effect at polling places.

On December 5, 2016, Defendant Morrissey filed a Notice of Appeal with the Tenth Circuit Court of Appeals in the 2627 Action and on December 6, 2016, he also filed a Notice of Appeal in the 2649 Action.

Neither Secretary of State Williams nor Attorney General Coffman appealed the order of the federal District Court.

Status: By order dated January 19, 2017, the District Court substituted newly-elected Denver District Attorney Beth McCann, in her official capacity, for former Denver District Attorney Mitch Morrissey.

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[6] On this point, the Court cited to various Colorado statutory provisions that make it illegal, for example, to interfere with other voters, to induce a voter to show how he marked his ballot, or to intimidate or coerce a voter.

In the 2017 regular legislative session of the Colorado General Assembly, legislation has been introduced (House Bill 17-1014), passed, and signed by the Governor that would eliminate the criminal penalty imposed on a voter for showing his or her ballot after it is prepared for voting so as to reveal its contents.

By order dated February 10, 2017, the District Court granted a joint, unopposed motion filed by the Defendants to stay the case pending the General Assembly's consideration of House Bill 17-1014 and also ordered the Clerk of the Court to administratively close the action pursuant to D.C.COLO.L.CivR 41.2.[7] The Court further gave the parties leave to file a request to reopen the case, or to file a motion to dismiss, within 14 days of the final outcome of House Bill 17-1014.

Counsel of record: In the 2627 Action, the Plaintiffs are represented by Michael Francisco of MRD Law, Stephen Klein of the Pillar of Law Institute, and Daniel Domenico of Kittredge LLC. In the 2649 Action, Plaintiffs are represented by Adam Frank and Faisal Salahuddin of Frank & Salahuddin and Scott Moss of the University of Colorado Law School. In both actions, Defendants Williams and Coffman are represented by LeeAnn Morrill, Matthew Grove, and Christopher Jackson of the Attorney General's office and Defendant McCann is represented by Andrew Ringel and Matthew Hegerty of Hall and Evans, LLC.

Staff member monitoring the case: Bob Lackner

II. Cases of Interest to Members of the General Assembly:

a. Alcohol Regulation

i. *Denver Neighborhood-Supported Social Consumption Committee, et al. v. Colorado Department of Revenue and Brohl*, Case No. 2017 CV 30486 (Denver District Court).

Subject: The authority of the Liquor Enforcement Division ("LED") in the Department of Revenue ("Department") to adopt Regulation 47-900. E., prohibiting marijuana consumption in a liquor-licensed establishment.

Background/Issue: On February 3, 2017, Denver Neighborhood-Supported Social Consumption Committee; Emmett Reistroffer and Kayvan Khalatbari, individuals; Sexy Pizza 2 LLC (South Pearl); and Sexy Pizza 3 LLC (Jefferson Park) (collectively "Plaintiffs") filed a complaint for judicial review of a final agency action pursuant to section 24-4-106, C.R.S., against the Department and Barbara J. Brohl, in her official capacity as Executive Director of the Department and as the State Licensing Authority, the Liquor Enforcement Division (collectively "Defendants"). Plaintiffs allege that Defendants lacked authority to adopt Regulation 47-900. E., which prohibits a person or entity licensed under the "Colorado Beer Code," article 46 of title 12, C.R.S., the "Colorado Liquor Code," article 47 of title 12, C.R.S., or the special event permit laws, article 48 of title 12, C.R.S., from permitting consumption of marijuana or marijuana products on the licensed premises. Additionally,

[7] D.C.COLO.L.CivR 41.2, entitled "Administrative Closure" provides that "[a] district judge or magistrate judge exercising consent jurisdiction may order the clerk to close a civil action administratively subject to reopening for good cause. Administrative closure of a civil action terminates any pending motion. Reopening of a civil action does not reinstate any motion."

Plaintiffs allege that, since Denver voters approved Initiated Ordinance 300, which allows for social use of marijuana at any business, including liquor-licensed establishments, under circumstances outlined in the ordinance, the LED regulation is void because it became effective after the date on which the Denver initiated ordinance became effective. Finally, the Plaintiffs allege that the rulemaking record does not support the adoption of Regulation 47-900. E., because the rulemaking was not based on recommendations from marijuana industry stakeholders, medical marijuana patients, retail marijuana consumers, or alcohol beverage consumers, nor on concerns of increased criminal activity if consumption of both marijuana and alcohol beverages is allowed on liquor-licensed premises.

Status: Plaintiffs filed their complaint in Denver District Court on February 3, 2017, and the Defendants have not yet filed an answer or other responsive pleading as of the date of this summary.

Counsel of record: Plaintiffs are represented by Kelly A. Rosenberg and Joshua Kappel of Vicente Sederberg, LLC.

Staff member monitoring this case: Christy Chase

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b. Criminal Law

i. *Nelson v. Colorado*, No. 15-1256, (United States Supreme Court December 21, 2015), petition for a Writ of Certiorari from No. 2013 SC 495 (Colorado Supreme Court September 29, 2016).

Subject: Refunding restitution and other court costs when a conviction is reversed on appeal and the defendant is subsequently acquitted or there is no retrial.

Background/issue: Defendant Nelson was originally convicted of five counts of sexual assault, sentenced to the department of corrections, and ordered to pay $8,192.50 in restitution and costs. While incarcerated, she had $681.35 withheld from her inmate account due to the restitution and fees. Her conviction was subsequently reversed on appeal, and, on retrial, she was acquitted of all charges. Nelson moved the trial court for a refund of the amounts withheld while incarcerated. The issue is whether the trial court had the authority to order a refund or whether Nelson was required to file a claim under the statutory process for compensation for exonerated persons which would require her to prove that she was innocent. The trial court held that it had no authority to order a refund and denied the motion.

Nelson appealed to the Colorado Court of Appeals which found that, because the payments were not related to a valid conviction, the state had no authority to collect these amounts and ordered a refund of the amounts to Nelson. The state appealed the decision to the Colorado Supreme Court.

The Colorado Supreme Court granted certiorari and held that, without statutory authorization, a trial court lacks the authority to order the state to refund money collected from a defendant later acquitted. The Court held that such a defendant must seek compensation under article 65 of title 13, C.R.S., for compensation for certain exonerated persons by filing a separate action under that article.

Nelson appealed the decision of the Colorado Supreme Court to the United States Supreme Court. The United States Supreme Court granted certiorari.

Status: The United States Supreme Court conducted oral arguments on January 9, 2017. The Court has not yet issued an opinion in this matter.

In the 2017 regular legislative session of the Colorado General Assembly, legislation was introduced, enacted, and signed by the Governor (House Bill 17-1071) that establishes a process for a person who has paid a monetary amount due to a criminal conviction to request a refund of the amount paid if: 1) The conviction was overturned and either the charges were dismissed or the person was acquitted following a new trial; or 2) All or part of an order for restitution was reversed and the person paid more restitution than was ultimately ordered.

Governor Hickenlooper signed the bill on March 23, 2017.

Counsel of record: Defendant Nelson is represented by Suzan Trinh Almony and Douglas Wilson and the State is represented by Frederick R. Yarger, the Colorado Solicitor General.

Staff member monitoring this case: Jerry Berry

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c. **Education**

i. ***Denver Classroom Teachers Association v. School Dist. No. 1*, No. 15 SC 589 (Colorado Supreme Court April 25, 2016), petition for Writ of Certiorari from No. 2015 CA 71 (Colorado Court of Appeals June 4, 2015).**

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 District appealed the decision of the Court of Appeals by filing a petition for a Writ of Certiorari with the Colorado Supreme Court. On April 25, 2016, the Court granted the petition on the following issue: "Whether the Innovation Schools Act, sections 22-32.5-101 to 22-32.5-111, C.R.S. (2015), precludes new innovation schools, which were not previously opened as non-innovation schools, because section 22-32.5-104(3)(f) of the Act requires that innovation plans include information regarding teacher support." The briefing has been completed and the Court conducted oral arguments on December 7, 2016. The Court has not yet issued an opinion in the case.

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,* No. 15-557, (United States Supreme Court November 15, 2015), petition for a Writ of Certiorari from No. 2013 SC 233 (Colorado Supreme Court June 29, 2015).

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. Various reply and supplemental briefs were filed on January 13, 2016, and the petition was distributed for the Supreme Court's February 19, 2016 conference. Due to the death of Justice Scalia on February 13, the February 19 conference did not occur. The petition for writ has not been rescheduled for conference at this time.

The United States Supreme Court granted certiorari in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, (No. 15-577). The issue in that case is whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern. Missouri has a constitutional prohibition similar to Colorado's that prohibits state aid for sectarian purposes. The consensus is that the resolution of the *Trinity Lutheran* case will directly impact the decision in the *Douglas County* case, and may be the reason for a delay in the Supreme Court's decision on whether to grant certiorari. The *Trinity Lutheran* case has not been scheduled for oral argument.

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*, No. 15 SC 1062 (Colorado Supreme Court March 21, 2016), petition for a Writ of Certiorari from No. 14 CA 1348 (Colorado Court of Appeals November 5, 2015).

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, which the Supreme Court granted on March 21, 2016. The defendants filed their opening brief on June 6, 2016. The plaintiffs filed their answer brief by July 29, 2016. The Court held oral arguments in the case on December 7, 2016. There is no specified time by which the Supreme Court will issue a ruling; it usually takes several months.

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 Colorado Attorney General's office.

Staff member monitoring the case: Julie Pelegrin

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iv. *Thomas et al. v. Douglas County Board of Education et al*, No. 16-1258 (10th Circuit), on appeal from No. 16-CV-00876 (United States District Court for the District of Colorado June 9, 2016).

Subject: Complaint for declaratory and injunctive relief enjoining the Douglas County Board of Education from implementing its new School Choice Grant Program (grant program) in a manner that limits the use of the grant for non-religious private schools in violation of the Free Exercise, Establishment, Equal Protection, Free Speech, and Due Process Clauses of the United States Constitution.

Background/Issue: In its June 29, 2015, decision in Taxpayers for Public Education v. Douglas County School District, 2015 CO 50, the Colorado Supreme Court reinstated the trail court's order enjoining the implementation of the Douglas County School District's Choice Scholarship Program (CSP). A plurality of the Court held that the CSP violated Article IX, Section 7, of the Colorado Constitution prohibiting aid to religious schools. The Douglas County School district filed an appeal to the United States Supreme Court defending the constitutionality of the inclusion of religious schools in the CSP. While briefing on the Petition for Writ of Certiorari has been completed, the United States Supreme Court has not yet decided whether to consider the case.

In response to the Colorado Supreme Court's decision, on March 15, 2016, the Douglas County Board of Education approved the new School Choice Grant Program (Choice Grant Program) that allows students to receive grants to attend private schools, but not private religious schools. Stephen and Christina Thomas and two other families represented by the Institute of Justice filed this action seeking not to enjoin the Choice Grant Program, but to bar the Douglas County Board of Education from enforcing specific provisions of the program that mandate the exclusion of private religious schools. The Plaintiffs argue that the exclusion of religious options from the program violates the Free Exercise, Establishment, Equal Protection, and Free Speech Clauses of the United States Constitution, as well as the Due Process Clause, which guarantees the fundamental right of

parents to control and direct the education and upbringing of their children. The Douglas County Board of Education filed a response in opposition to the motion for preliminary injunction, but did not respond to the substantive issues relating to the new Choice Grant Program's constitutionality.

On June 9, 2016, Judge Krieger of the United States District Court denied the Plaintiffs' Motion for Preliminary Injunction. The Court found that, while the parties may have the proper attributes required for standing under Article III of the United States Constitution, the similarity in posture between the Douglas County Board of Education and the Plaintiffs implicates the doctrine of prudential standing, which is a judicially self-imposed limit on the exercise of federal jurisdiction. Where, as here, the Plaintiffs and the defendant, for whatever reasons, both desire the same outcome, the case lacks the adverseness necessary to fully form the arguments that the Court relies on to determine the constitutional issues. Further, after considering the specific standards for a preliminary injunction, the Court determined that, given the unsettled nature of the law relating to the constitutional issues, the Plaintiffs cannot show a strong likelihood of prevailing on the claims or show that they are at imminent risk of suffering genuine irreparable harm.

Status: The Intervenors, Taxpayers for Public Education, et al, have filed a Motion to Dismiss. The Defendants, Douglas County Board of Education, et al, have filed a Motion to Stay the Proceedings Pending Resolution of *Trinity Lutheran Church of Columbia, Inc. v. Pauley* (granted certiorari by the United States Supreme Court and concerning the exclusion of churches from otherwise neutral and secular aid programs). The Plaintiffs have filed an appeal of Judge Krieger's ruling on the Motion for a Preliminary Injunction to the Tenth Circuit Court of Appeals.

Chief Judge Michael Martinez of the Second Judicial District granted the Motion to Enforce Injunction filed by Taxpayers for Public Education and other parties seeking to have the new grant program shut down using the existing injunction against the original scholarship program. Judge Martinez ruled that the new grant program was not sufficiently different from the prior program and therefore enjoined the new program. Citing concerns regarding the cost of defending two versions of the same program (See *Douglas County School District vs. Taxpayers for Public Education* in this Litigation Summary) the Douglas County School Board of Education voted on November 15, 2016, to rescind the Choice Grant Program.

The parties stipulated to dismiss the case. The case was dismissed on August 12, 2016.

Counsel of record: The Plaintiffs are represented by the Institute For Justice. The Defendants are represented by Lewis Roca Rothgerber Christie, LLP. The Intervenors are represented by Faegre Baker Daniels LLP., American Civil Liberties Union, and Arnold & Porter, LLP.

Staff member monitoring the case: Brita Darling

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d. Elections

i. *Independence Institute v. Williams*, No. 14-1463 (10th Circuit February 4, 2016).[8]

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,[9] the Institute will be required to report and disclose its donors and their names, addresses, and occupations if the organization makes a communication that merely mentions Governor Hickenlooper, a candidate for reelection in the 2014 general election, in an advertisement 30 days before a primary election or 60 days before a general election. Considering the time needed to produce the advertisement and raise the funds necessary to air the advertisement, the Institute planned to run the advertisement after September 5, 2014, and, consequently, during the electioneering communication period.

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

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

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

[9] *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).

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.

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.

In an opinion issued on February 4, 2016, the Tenth Circuit Court of Appeals affirmed the District Court's grant of summary judgment in favor of the Secretary. The Tenth Circuit initially concluded that sufficiently tailored disclosure requirements can reach at least some type of issue speech, including speech that does not reference a particular election campaign but does mention a candidate shortly before an election as was true of the Institute's ads at issue. The state's disclosure requirements serve the legitimate interest of informing the public about the financing of ads that mention political candidates in the final weeks of a campaign. The Court went on to hold that the state's disclosure requirements as applied to the Institute's ad satisfy the exacting scrutiny standard of review articulated by the U.S. Supreme Court in the *Citizens United* case. The Court found that the Colorado disclosure requirements serve important government interests and are sufficiently tailored to justify the compelled disclosure only of funds earmarked for the financing of such ads.

Status: The Institute elected not to appeal the Tenth Circuit's decision to the U.S. Supreme Court. Accordingly, the litigation concluded with the Tenth Circuit's decision.

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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e. Energy

i. ***State of West Virginia v. U.S. Envt'l Protection Agency, et al.*****, No. 15-1363 (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[10] 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.[11]

[10] 42 U.S.C. 7411(d).

[11] 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. The Governor did not pursue any other legal action.

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 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: Oral argument was held on September 27, 2016, and a transcript of the proceedings was released on November 14. An opinion is pending.

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

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ii. *State of Colorado v. Boulder County*, No. 2017 CV 030151 (Boulder County District Court).

Subject: Whether Boulder County's temporary moratorium on new applications for oil and gas development is preempted by state law pursuant to the Colorado Supreme Court's decisions in *City of Longmont v. Colo. Oil and Gas Ass'n*, 2016 CO 29, 369 P.3d 573 (Colo. 2016), and *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 2016 Co 28, 369 P.3d 586 (Colo. 2016).

Background/Issue: On February 2, 2012, the Board of County Commissioners of Boulder County ("Board") adopted Resolution 2012-16, establishing a moratorium on accepting new applications for oil and gas development by directing the County Land Use Department "not to accept, process, or approve any applications" for oil and gas development. On May 1, 2012, three months before the moratorium was set to expire on August 2, 2012, the Board adopted Resolution 2012-46, extending the moratorium through February 4, 2013, for the purpose of amending the county's oil and gas regulations. The Board adopted 7 more resolutions to extend the moratorium, which is currently set to expire on May 1, 2017.

On May 2, 2016, the Colorado Supreme Court, in the *City of Longmont* and the *City of Fort Collins* cases, struck down oil and gas development moratoria in the cities of Longmont and Fort Collins on grounds that the moratoria - the former a permanent ban on hydraulic fracturing and the latter a temporary five-year ban on new oil and gas development - operationally conflicted with the Colorado Oil and Gas Conservation Act and the regulations adopted by the Colorado Oil and Gas Conservation Commission in furtherance of the Act and, therefore, were preempted by state law.

On January 26, 2017, the Colorado Attorney General sent a letter to the Board stating that the Board must rescind the moratorium by February 10, 2017, because the moratorium "violates state law" based on the *City of Longmont* and *City of Fort Collins* decisions. On January 27, 2017, the Board responded in a letter to the Attorney General stating that the moratorium needed to remain in place

until May 1, 2017, so that the Board would be able to update its regulations concerning oil and gas development.

On February 14, 2017, the Attorney General filed a complaint against the Board and Boulder County ("County") in Boulder County District Court, seeking declaratory and injunctive relief. The Attorney General seeks a declaratory judgment that the Board's moratorium on new applications for oil and gas development is preempted by state law and a permanent injunction enjoining the Board and the County from enforcing the moratorium.

On February 23, 2017, the Colorado Oil and Gas Association ("COGA") and the American Petroleum Institute ("API") filed a joint motion to intervene in the lawsuit and the District Court granted the motion on February 24, 2017.

On March 7, 2017, the County and the Board filed a motion to dismiss the complaint on grounds that the issue would become moot before the litigation could be resolved; the Plaintiff unreasonably delayed its filing of claims and that the claims were, therefore, barred by laches; and a portion of the Plaintiff's claims were time-barred because they were filed after the applicable statute of limitations.

Status: On March 28, 2017, the State filed a moratorium in opposition to the County's motion to dismiss. On March 30, 2017, COGA and API filed a joint response to the County's motion to dismiss.

Counsel of record: The State of Colorado is represented by the Colorado Attorney General's Office. The Colorado Oil and Gas Association and the American Petroleum Institute are represented by Mark Mathews and Julia E. Rhine of Brownstein Hyatt Farber Schreck, LLP. The County and the Board are represented by David Hughes, Katherine Burke, and Catherine Ruhland of the Boulder County Attorney's Office.

Staff member monitoring the case: Jennifer Berman

f. Environmental Remediation

i. ***New Mexico v. Colorado*, United States Supreme Court No. 220147.**

Subject: Whether Colorado is liable to New Mexico under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal Resource Conservation and Recovery Act (RCRA), and the common law claims of public nuisance, negligence, and gross negligence for the August 5, 2015, Gold King Mine blowout that caused the release of millions of gallons of mine wastewater and hundreds of thousands of pounds of metals into the Animas River and subsequently into the San Juan River in New Mexico.

Background/Issue: On August 5, 2015, mine reclamation activities led by the federal Environmental Protection Agency in consultation with the Colorado Division of Reclamation, Mining, and Safety triggered a blowout in an adit of the abandoned Gold King Mine near Silverton, Colorado. The reclamation team began draining the mine and digging away at some of the blockage caused by a 2009 collapse in the adit. Due to high water pressure inside the mine, this activity caused the blowout that released more than 3 million gallons of mine wastewater and 880,000 pounds of

metals into Cement Creek, a tributary of the Animas River. The outflowing wastewater and metals flowed down the Animas River into New Mexico, where the Animas River joins the San Juan River. The released metals included arsenic, lead, cadmium, copper, mercury, and zinc.

On June 20, 2016, New Mexico filed a motion for leave to file a bill of complaint against Colorado in the United States Supreme Court. In the motion, New Mexico asked the Court to exercise its original jurisdiction to hear controversies between two or more states pursuant to its authority under Article III, sec. 2, cl. 2 of the United States Constitution. New Mexico attached the complaint it wished to file to the motion for leave to file, asserting the following claims against Colorado:

- New Mexico is entitled to the recovery of costs against Colorado under 42 U.S.C. §9607(a) of the CERCLA because Colorado acted as an "operator" of the Gold King Mine at the time of the blowout or as an "arranger" of the activities that led to the blowout;
- New Mexico is entitled to a declaratory judgment under 42 U.S.C. §9613(g)(2) of the CERCLA for future costs New Mexico will incur in relation to its cleanup efforts;
- The Court should award injunctive relief under 42 U.S.C. §6972(a)(1)(B) of the RCRA because Colorado contributed to the disposal of hazardous waste in a manner that presented an imminent and substantial endangerment to the health and environment of New Mexico's citizens;
- Colorado's conduct constituted a public nuisance because it unreasonably interfered with the right of New Mexico's citizens to use and enjoy New Mexico's rivers and constituted an unreasonable and substantial danger to the public health and safety of New Mexico's citizens; and
- Colorado acted negligently because it failed to act with reasonable care in conducting its remediation of the Gold King Mine or it acted with gross negligence because its conduct was reckless, wanton, and willful.

On October 21, 2016, Colorado filed a brief in opposition to New Mexico's motion for leave to file a bill of complaint, arguing the following: (1) Neither the CERCLA nor the RCRA provide a basis on which one state may sue another state; (2) The Court should not exercise its original jurisdiction to hear the case because there is an alternative forum available for New Mexico's claims and, in fact, New Mexico has filed virtually the same lawsuit in federal district court; (3) New Mexico's claims fail on the merits because Colorado is not a covered person subject to liability under the CERCLA or the RCRA where Colorado's conduct was purely regulatory; (4) A remedial action has been initiated under the CERCLA as a result of the Gold King Mine incident and such remedial action forecloses the filing of a citizen suit under the RCRA; and (5) Congress intended the CERCLA and the RCRA to displace federal common-law claims related to issues of water contamination.

On November 4, 2016, New Mexico filed a reply brief in the matter, arguing the following in support of its motion for leave to file a bill of complaint: (1) There is no alternative forum available to address its claims against Colorado; (2) The complaint pleads valid causes of action under the CERCLA and the RCRA, neither of which exempts regulatory conduct, because Colorado acted as an "operator" and an "arranger" by exercising substantial control over the Gold King Mine and being actively involved in the activities that led to the blowout; and (3) The complaint pleads valid federal common law causes of action that are not foreclosed by the federal acts because both the CERCLA and the RCRA have savings clauses that expressly preserve federal common law claims.

Status: On November 28, 2016, the Court invited the Acting Solicitor General to file a brief expressing the views of the federal Department of Justice on New Mexico's motion. As of the date of this summary, the Acting Solicitor General has not yet filed his brief.

Counsel of record: New Mexico is represented by the New Mexico Attorney General's Office; William J. Jackson and John D. S. Gilmour of Jackson Gilmour & Dobbs, PC; and Marcus J. Rael, Jr. of Robles, Rael & Anaya, P.C. Colorado is represented by the Colorado Attorney General's Office and Carolyn L. McIntosh and Peter S. Gould of Squire Patton Boggs LLP.

Staff member monitoring the case: Jennifer Berman

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g. Ethics

i. *Gessler v. Grossman*, No. 2015 SC 462 (Colorado Supreme Court June 20, 2016), petition for a Writ of Certiorari from No. 14 CA 0268 (Colorado Court of Appeals May 7, 2015).

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?

On June 20, 2016, the Colorado Supreme Court granted the petition for Writ of Certiorari on all of the questions presented above. Briefing has been completed and Gessler has requested oral argument.

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 Colorado Attorney General's Office.

Staff members monitoring the case: Jennifer Gilroy and Bob Lackner

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h. Income Tax/Conservation Easements

i. *Gentz, et al. v. Colorado Department of Revenue, et al.*, 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 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.

The DOR filed a motion to dismiss all but the Gentzes' first claim for relief. The trial court granted the motion on April 26, 2016, and set the case for trial on September 26, 2016. The parties have since filed a notice of settlement and joint motion to stay the case deadlines pending the finalization of settlement documents.

Status: The parties have settled the case. An order granting the unopposed motion to dismiss all claims was entered on October 21, 2016. This matter has been concluded.

Counsel of record: The Gentzes are represented by 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 Colorado Attorney General's office.

Staff member monitoring the case: Gregg Fraser

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ii. *Landowners United Advocacy Foundation v. State of Colorado, et al.*, No. 16-CV-00603 (United States District Court for the District of Colorado).

Subject: Has the manner in which the state has undertaken to resolve disputed claims for conservation easement income tax credits violated the rights of landowners who donated the easements? 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 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. The Colorado Department of Revenue ("Department") has disputed the validity and value of a significant number of conservation easements since the program was created in 1999. One basis the Department has relied upon for denying the validity of an easement is that the instrument creating the easement does not contain certain language regarding the potential extinguishment of the easement and the disposition of the proceeds resulting from any such extinguishment (extinguishment and proceeds language).

In 2011, after a significant backlog of disputed credits developed in the Department, the General Assembly adopted House Bill 11-1300, which allowed taxpayers to elect to proceed directly to District Court to appeal the denial of their conservation easement tax credits. The bill also authorized the use of a "phased approach" to resolving conservation easement tax credit disputes. The first phase of this process considers only the validity of the easement at issue. Subsequent phases address the valuation of the easement, the amount of tax due, and other issues related to the disputed tax credit.

Landowners United Advocacy Foundation, Inc. (LUAF) is a nonprofit entity consisting primarily of landowners who have donated conservation easements for which tax credits have been denied by the state. LUAF filed a civil action in the U.S. District Court for the District of Colorado under 42 U.S.C. Sec. 1983 alleging that its members have been faced with unlawful and arbitrary actions with respect to their participation in the state's conservation easement program. LUAF further alleges that the state has carried out a bait-and-switch scheme by inducing landowners to place conservation easements on their property and then deny their ability to claim tax credits. In particular, LUAF disputes the state's position that an instrument creating an easement requires extinguishment and proceeds language. LUAF also alleges that the phased approach to resolving disputed credits is a retrospective application of a law that destroys the procedural and substantive rights of taxpayers.

LUAF's complaint has named as defendants the state of Colorado, the Department, the Division of Real Estate, the Board of Real Estate Appraisers, the Colorado Conservation Easement Oversight Commission, and various officials associated with these entities. The five-count complaint asserts that the defendants' actions have violated the landowner's rights to due process and equal protection under the state and federal constitutions, amount to an illegal taking of private property for public use without just compensation, and constitute the ex post facto application of laws and the impairment of third-party contracts.

Status: On June 23, 2016, the defendants filed a motion to dismiss the complaint based on the 11th Amendment bar against certain suits against a state by the state's own citizens, lack of standing, protection provided by the Tax Injunction Act, the comity doctrine, and failure to state a claim upon which relief can be granted. The motion is pending before the Court.

Counsel of record: Landowners United Advocacy Foundation is represented by Dori E. Richards and A. Blair Dunn of Western Agriculture, Resource and Business Advocates, LLP, of Albuquerque, New Mexico. The state is represented by Alison K. Blair and Noah C. Patterson of the Colorado Attorney General's office.

Staff member monitoring the case: Gregg Fraser

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i. Interstate Commerce

i. *Direct Marketing Ass'n v. Brohl*, No. 15A1259 (United States Supreme Court June 14, 2016), application for petition for Writ of Certiorari from No. 12-1175 (10th Circuit February 22, 2016).

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.[12]

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

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

The DMA sought a declaratory judgment that the notice and reporting requirements set forth in the Act, as well as all DOR rules promulgated pursuant to those requirements, are unconstitutional, a permanent injunction enjoining enforcement of the requirements by the DOR, and costs and attorneys' fees.

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

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

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.

The outcome of the case in the Tenth Circuit turns largely on the interpretation of the scope of a United States Supreme Court case, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which established that a state may not require an out-of-state retailer without a physical presence in the state to collect sales tax. The Tenth Circuit held that *Quill* applied only to sales and use tax collection and not to the imposition of notice and reporting obligations. This decision means that *Quill* does not establish that an out-of-state retailer is free from all regulatory requirements.

The Tenth Circuit held that the 2010 law does not discriminate, either on its face or in its practical effects, against interstate commerce. First, the Court held that on its face the 2010 law does not distinguish between out-of-state retailers and in-state retailers, and instead makes a distinction based on whether a retailer collects sales tax or not. The Court noted that "some out-of-state retailers are collecting retailers, some are not" and explained that, because there is no language in the 2010 law explicitly identifying geographical distinctions, there is no facial discrimination.

The Tenth Circuit held that the 2010 law does not discriminate in its practical effects for 3 reasons: (1) While there is differential treatment, here the 2010 law does not negatively affect out-of-state interests and the 2010 law does not give in-state retailers a competitive advantage; (2) The differential treatment does not amount to discrimination because the in-state retailers and out-of-state non-collecting retailers are not similarly situated; and (3) When looking at the entire regulatory scheme, the 2010 law is designed to increase compliance with preexisting tax obligations and applies only to retailers that are not otherwise required to comply "with the greater burden of tax collection and reporting."

Finally, the Tenth Circuit held that the 2010 law does not unduly burden interstate commerce. DMA relied solely on *Quill* for its undue burden claim and the District Court limited its undue burden analysis to *Quill*. Because the Court held that *Quill* applies only to sales and use tax collection and not to the imposition of notice and reporting requirements, *Quill* does not control the undue burden analysis and cannot be extended to the 2010 law, which, therefore, does not impose an undue burden on interstate commerce.

The Tenth Circuit reversed the District Court's order granting summary judgment to DMA and remanded the case to the District Court for further proceedings consistent with its opinion. The DMA has requested an extension of time to file a petition for Writ of Certiorari to the United States Supreme Court, which was granted, and now the DMA has until August 29, 2016, to seek an appeal with the United States Supreme Court.

On August 29, 2016, the DMA filed a Petition for Writ of Certiorari with the United States Supreme Court. The DMA presented the following issues: 1) Whether a state statute that imposes regulatory obligations that apply, as a matter of law, solely to out-of-state companies, but does not use "language explicitly identifying geographical distinctions" in its text, discriminates against interstate commerce? 2) Whether the Tenth Circuit erred in adopting a "comparative burdens" test for discrimination, under which the burden of regulatory requirements imposed solely on out-of-state retailers may be offset by different obligations imposed on in-state retailers? and 3) Whether the Tenth Circuit erred in concluding that out-of-state retailers that do not collect Colorado sales tax are "not similarly situated" to their direct in-state competitors who collect Colorado sales tax? The DOR subsequently filed a Conditional Cross-Petition for a Writ of Certiorari. The DOR asked the United States Supreme Court whether Quill should be overturned. The DOR then filed its Brief In Opposition of the DMA's Petition for A Writ of Certiorari. The DOR argued that the United States Supreme Court should not grant review because "DMA's Petition seeks mere error correction in a well-settled area of law and identifies no circuit split or other disagreement among the lower courts. . . . In the event that this Court grants review, however, it should reframe DMA's three questions presented into" the single question of whether Quill should be overturned because the reframed question is of significant national importance. On December 12, 2016, the United States Supreme Court denied the DMA's petition, thereby foreclosing any further appeals. This means that the DOR may enforce the Act (House Bill 10-1193) as soon as the stay of proceedings in the Denver District Court is lifted and that case is dismissed. It is anticipated that the DOR will know in early 2017 when it will start enforcing the Act.

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 Colorado Attorney General's Office.

Staff member monitoring the case: Esther van Mourik

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j. Marijuana Legislation

i. ***Justin E. Smith, et al., v. Hickenlooper,*** No. 16-1095 (10th Circuit), on appeal from No. 15-CV-00462 (United States District Court for the District of Colorado February 6, 2016).

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. On February 26, 2016, the District Court granted the Defendant's motion to dismiss. The Court decided that there is not a cause of action under the Supremacy Clause or the Federal Controlled Substances Act to support the plaintiff's claims.

Appeal: On March 25, 2016, the Plaintiffs filed their appeal with the 10th Circuit Court of Appeals. The appellants' briefs were filed with the Court of Appeals on June 2, 2016, and June 3, 2016. The appellees filed their briefs with the Court on August 8, 2016. The appellants filed their reply briefs on August 29, 2016, and all other briefing from amicus parties and intervenors has been submitted. Oral arguments took place on January 17, 2017.

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 Colorado Attorney General's office.

Staff member monitoring the case: Michael Dohr

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***ii. The City of Northglenn, et al., v. Board of County Comm'nrs of Adams County*, No. 15 CA 1743 (Colorado Court of Appeals).**

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.[13]

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.

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[13] 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.

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

1. Neither the Cities nor Apogee Management can establish that it has suffered an injury in fact. The County argues that the Plaintiffs' alleged injuries are purely speculative and hypothetical. Apogee Management is not open for business in Adams County and therefore, cannot suffer an injury due to the tax. The Cities cannot establish an injury based on competition as they are not in the retail marijuana business and therefore are not competitors in that market. Furthermore, Adams County argues that different sales tax rates apply throughout the state, and no Colorado court has ever conferred standing upon a municipality or business based on an assertion that differing sales tax rates might someday create a competitive disadvantage.
2. Neither the Cities nor Apogee Management will be paying the tax and therefore will not bear the financial burden of the tax. Adams County argues that the party who bears the financial burden of the tax is the party potentially aggrieved and that, in this case, the people who will bear the financial burden will be the people who purchase retail marijuana.
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 with the Colorado Court of Appeals. 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. The Plaintiff-Appellants and the Defendant-Appellee filed opening and response appellate briefs in April and May of 2016. The Plaintiff-Appellants have requested oral argument on the appeal.

On December 15, 2016, the Colorado Court of Appeals issued an opinion in which it concluded that the District Court correctly determined that the cities had standing to bring their claims and that Adams County does not have constitutional or statutory authority to impose a special sales tax on retail marijuana.

Regarding the Cities' standing, the Court concluded that the County's special sales tax would likely harm the fiscal interests of the Cities by reducing their tax revenues and that the prospective economic harm from the imposition of the County's special sales tax constitutes an injury in fact. The Court also concluded that home rule cities have a legally protected interest in their fiscal integrity and that the County's special sales tax would create a risk that the Cities' tax collection would be impaired. Therefore, the Cities suffered an injury to a legally protected interest. The Court stated that, for those reasons, the District Court correctly held that the Cities have standing.

Regarding the County's authority to impose a special tax, the Court determined that a county may impose a special sales tax only where there is express constitutional or statutory authority to do so. The Court held that neither the County's general sales tax authority nor the retail marijuana sales tax statutes confers express authority for Colorado counties to enact a special sales tax on retail marijuana. The Court stated that the general taxing authority in section 29-2-103, C.R.S., authorizes only a general sales tax and not a special sales tax. In addition, the Court stated that the absence of a prohibition against counties imposing a special sales tax on marijuana in the retail marijuana tax statute (section 39-28.8-203, C.R.S.) does not mean that the county is necessarily authorized to impose such tax. The Court further held that the election approving the County's special retail marijuana sales tax does not constitute legislative authority to impose the tax, stating that whether the County held a valid election is irrelevant to whether it had the legislative power to impose the special sales tax.

Accordingly, the Court held that the County's special sales tax on retail marijuana is invalid and reversed the judgment of the District Court.

On February 1, 2017, the County filed a petition for a Writ of Certiorari with the Colorado Supreme Court on the following issues: 1) Whether Respondent Cities had standing to challenge Adams County's countywide sales tax on the sale of recreational marijuana; and 2) Whether Adams County had the authority to establish a voter approved countywide sales tax on the sale of recreational marijuana.

The Supreme Court has not yet ruled on the petition.

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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k. TABOR

i. ***Colo. Union of Taxpayers Foundation v. City of Aspen*, No. 16 SC 377 (Colorado Supreme Court), on appeal from No. 14 CA 1869 (Colorado Court of Appeals November 5, 2015).**

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 September 6, 2016, the Colorado Supreme Court granted CUT's Petition for Writ of Certiorari and the case is in the briefing stage.

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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ii. *TABOR Foundation v. Regional Transportation District, et al.,* No. 16 SC 639 (Colorado Supreme Court), Petition for Writ of Certiorari from No. 15 CA 582 (Colorado Court of Appeals June 30, 2016).

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. Under the legislation, 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.

On April 8, 2015, the TABOR Foundation appealed the trial court's decision to the Colorado Court of Appeals, and on June 30, 2016, the Court of Appeals announced its decision affirming the lower court's judgment.

Before addressing the merits of the case, the Court addressed the standard for reviewing the constitutionality of a statute. It held that the general "beyond a reasonable doubt" standard of

unconstitutionality applies to challenges to a statute that are based on TABOR. Under this standard, the Colorado Supreme Court has said that a court will not strike down a statute "unless a 'clear and unmistakable' conflict exists between the statute and a provision of the Colorado Constitution." The Court of Appeals rephrased this standard as follows: "to hold a statute unconstitutional beyond a reasonable doubt, the constitutional flaw must be so clear that the court can act without reservation." While the Court of Appeals held that trial court misapplied this standard, it also held that HB13-1272 was not unconstitutional beyond a reasonable doubt.

First, the Court held that the statute did not violate TABOR's voter approval requirement because the legislation did not impose a new tax. It was not a new tax because the primary purpose of the law was not to raise revenue and because requiring an election to remove exemptions under TABOR would hamper the General Assembly's ability to administer taxation efficiently. And even if it was a new tax, the Court held that when voters approved past ballot questions—in 1973 for RTD and 1994 for SCFD—they gave authority for the districts to collect taxes that would be imposed in the future. While the Court found that this issue was not free from doubt, it held that the standard of review required it to reject the constitutional challenge.

In contrast, the Court found the second TABOR challenge—whether prior voter approval was required because eliminating the exemptions is a tax policy change directly causing a net revenue gain to the districts—to not be a close question. It focused on the plain meaning of the word "policy" in this TABOR phrase, and defined it as a "high level overall plan". With respect to the sales tax, the districts' high level overall plans are to tax a broad range of tangible items, and eliminating exemptions did not change these high level overall plans. Accordingly, the removal of exemptions did not constitute a tax policy change under TABOR.

Status: On August 11, 2016, the TABOR Foundation filed a Petition for Writ of Certiorari with the Colorado Supreme Court. The Supreme Court has not yet acted on the petition.

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; Mindy McNair, represents RTD and its Directors; and Charles Norton of Norton & Smith, P.C., and Alan Pogue of Icenogle Seaver Pogue, P.C., represents the SCFD and its Directors.

Staff member monitoring the case: Ed DeCecco

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iii. *National Federation of Independent Business v. Wayne Williams, Colorado Department of State, and the State of Colorado*, No. 2015 CA 2017 (Colorado Court of Appeals).

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.

Status: NFIB filed its Notice of Appeal on December 4, 2015. Briefing on the appeal was completed August 18, 2016. Oral argument took place on January 24, 2017.

In an unpublished opinion issued March 2, 2017, the Court of Appeals reversed the District Court's order granting summary judgment. The Court of Appeals concluded that the District Court erred when it granted summary judgment on the grounds that there was no genuine issue of material fact to be decided. The District Court made no findings indicating whether or to what degree the business and licensing charges have been adjusted since the passage of TABOR and how or if that has impacted the collected revenue. The parties provided no facts indicating whether any new action on the part of the secretary of state since the passage of TABOR has led to an increase in revenues to the Department of State. Thus, the District Court erred in granting summary judgment to Defendants because the issue of whether any adjustments to the business and licensing charges constitute a tax rate or policy change is a disputed issue of material fact.

The Court of Appeals remanded the case to the District Court with directions for further proceedings to determine whether the business and licensing charges have been adjusted or increased since the passage of TABOR in 1992 such that voter approval was required for these adjustments or increases. The Court of Appeals further directed that, depending upon the Court's determination, the District Court may need to address the issue of whether the business and licensing charges constitute a tax or a fee.

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 Colorado Attorney General's Office.

Staff members monitoring the case: Sharon Eubanks and Bob Lackner

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iv. *TABOR Foundation v. Colorado Department of Health Care Policy and Financing, et al.,* No. 2015 CV 32305 (Denver District Court).

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. Despite the fact that Defendants' last reply brief was filed on October 16, 2015, 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 Colorado Attorney General's Office represent the Defendants.

Staff member monitoring the case: Jason Gelender

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l. Urban renewal

i. ***M.A.K. Investment Group LLC v. City of Glendale and Glendale Urban Renewal Authority*, No. 15-CV-02353 (United States District Court for the District of Colorado).**

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 filed their Reply in Support of Motion to Dismiss on December 23, 2015.

On November 21, 2016, the Court entered an order dismissing MAK's complaint. Defendants had sought dismissal of MAK's complaint on the grounds that: 1) MAK had no due process rights in the blight determination because it was a legislative action; 2) MAK had no cognizable property interest in the blight determination to which due process rights could attach; 3) Colorado's statutory scheme provided enough notice and opportunity for review to satisfy MAK's right to due process; 4) the equal protection claim is not ripe; 5) the due process claim is not ripe; and 6) the equal protection claim fails to allege that a similarly situated class was treated differently. The Court found Defendants first and last arguments persuasive and, therefore, did not reach Defendants' remaining contentions.

With respect to the Defendants' first argument for dismissal, the Court found that the City's blight determination is a legislative act, and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution does not compel the City to provide notice or an opportunity for a hearing before or after it rendered its decision. Specifically, the U.S. Constitution does not entitle MAK to notice of the blight determination hearing, certain procedures at the hearing, notice of the blight determination, or notice of the opportunity for judicial review of the blight determination. Colorado law provides many of these procedural safeguards already, but the proper venue for demanding more by way of due process protections is the ballot box, not the federal courthouse. Accordingly, the Court dismissed MAK's due process claims.

MAK also claimed that the City's findings of blight violated its rights under the Equal Protection Clause of the Fourteenth Amendment. The basis of MAK's equal protection claim is that its conversation with a City official led it to be treated differently than similarly situated landowners whose property was declared blighted under the URL. In response, the Court found MAK's claims to be wholly without merit. Specifically, MAK had failed to identify such a similarly situated class. Additionally, MAK's claim that it was similarly situated to other landowners whose property was declared blighted is false. The Court noted that "[d]issimilar treatment of dissimilarly situated

persons does not violate equal protection." Consequently, the Court also dismissed MAK's equal protection claims.

Though the relief requested by MAK is minimal, the Court found no legal basis upon which it can be awarded.

Status: On December 20, 2016, MAK filed its Notice of Appeal with the U.S. Court of Appeals for the Tenth Circuit appealing the final judgment and order granting the motion to dismiss entered by the District Court on November 21, 2016.

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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m. Water Quality

i. ***North Dakota v. U.S. Environmental Protection Agency*, No. 15-CV-00059 (United States District Court for the District of North Dakota).**

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.

> 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."
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> *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 in the District of Columbia District Court, which the Judicial Panel on Multi-District Litigation denied on October 13, 2015. Instead, the Judicial Panel ruled that the Sixth Circuit Court of Appeals has exclusive jurisdiction to hear the litigation.

In the *North Dakota* 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, 2015, 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. *North Dakota v. U.S. Environmental Protection Agency*, 127 F.Supp.3d 1047 (D. N.D., 2015).

In early October 2015, 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. United States Army Corps of Engineers*, 803 F.3d 804 (6th Cir. 2015). In early November 2015, 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. In late February 2016, the 6th Circuit denied the challengers' motion to dismiss the litigation for lack of jurisdiction, holding that the Clean Water Act vests exclusive jurisdiction in the courts of appeals for a challenge to this type of rule. *Murray Energy Corp. v. U.S. Department of Defense*, 817 F.3d 261 (6th Cir. 2016). The *North Dakota* court has yet to respond to this ruling, and so the *North Dakota* litigation is still on-going. In January 2017, the Supreme Court agreed to review the Sixth Circuit ruling that an appellate court, not a district court, has jurisdiction to rule on the waters of the United States rule. The Supreme Court will not hear this case, *National Association of Manufacturers v. Department of Defense*, No. 16-299, until fall 2017.

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

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