DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: July 16, 2018 4:02 PM FILING ID: 72FA6102340E7 CASE NUMBER: 2015CV32305
PLAINTIFFS: TABOR FOUNDATION, *et al.*, v. **DEFENDANTS:** COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, *et al.*, and **INTERVENOR**: Colorado Hospital Association.	▲ **COURT USE ONLY** ▲
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COLORADO HOSPITAL ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT	

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Intervenor Colorado Hospital Association (CHA), pursuant to C.R.C.P. 56 and 121 § 1-15, moves for summary judgment against all Plaintiffs on all claims.

I. INTRODUCTION

Hospitals, and the life-saving services they provide, are a public good that supply important community benefits throughout the state. It is the proper job of government to support services and infrastructure necessary to protect the health, safety and welfare of the state's citizens, particularly where those services may not emerge naturally from operation of pure market forces. As it did recently to maintain Colorado's failing bridges, the General Assembly has created a TABOR-exempt enterprise, the Colorado Health Affordability and Sustainability Enterprise (CHASE), to keep the State's hospitals funded and operational. Just as it did with bridges, the TABOR Foundation has challenged this legislative solution as supposedly violating various provisions of TABOR. And just as the courts have reviewed and approved the Colorado Bridge Enterprise as a lawful, state-run, fee-based TABOR-compliant business, *see Tabor Foundation v. Colorado Bridge Enterprise*, 2014 COA 106, so too should this Court approve the parallel state-run business (CHASE) that is critical to operation of Colorado's hospitals in general, and survival of the State's rural hospitals in particular.

II. FACTS

Unlike the typical summary judgment motion that arises from a transaction or encounter between parties, the dispositive facts here are mostly matters of public

record, and thus essentially undisputed. CHA therefore leaves development of the undisputed facts to the State Defendants, and presents additional dispositive facts from its expert Chris Tholen, CHA's Executive Vice President.

Mr. Tholen's expert report is attached as **Exhibit 1**. It supplements the State Defendants' experts and evidence by providing context regarding operation of the previous Colorado Health Care Affordability Act Hospital Provider Fee (CHCAA HPF), and describing how the current Colorado Health Affordability and Sustainability Enterprise Hospital Affordability and Sustainability Fee (CHASE HASF (also referred to as the CHASE HPF)) functions. Mr. Tholen's report specifically explains how the CHASE HASF is a fee (not a tax) that leverages hundreds of millions of dollars in available federal funding. This money is critical to the continued operation of Colorado's hospitals in general, and Colorado's rural hospitals in particular.

To briefly summarize key points from Mr. Tholen's expert report:

- Medicaid is a joint financing partnership between the states and the federal government to provide health and long-term care services to low-income Americans. The federal government pays between 50 and 74 percent of all the costs of providing services to beneficiaries under the program. **Exhibit 1** at 2.
- For years, Colorado has taken advantage of available Medicaid funding the same way that nearly every state does: through a hospital provider fee that raises state money which is then amplified with matching federal funds. Colorado takes particular care to structure its hospital provider fee as a fee rather than a tax in light of TABOR. *Id.* at 2, 4-6.
- This fee greatly increases Colorado's ability to provide health care to low income Coloradans, which in turn helps minimize the extent to which

hospitals must shift the cost of uncompensated care to private payers. *Id.* at 3.

- The CHASE HASF was created by the Colorado General Assembly and operates transparently. *Id.* at 4, 7.

- The CHCAA HPF was repealed with the passage of S.B. 17-267 and completely shut down. The CHASE HASF originated with the passage of S.B. 17-267. The new CHASE HASF, while performing many of the same functions as the CHCAA HPF, also has significant differences. *Id.* at 4.

- The hospital provider fees are not passed through to patients as charges on bills or otherwise. While some of the costs entailed in operating the provider fee may be subsumed in hospital bills generally (like any element of overhead), there is no pass-through or linear relationship between the hospital provider fee and hospital charges. *Id.* at 6.

Mr. Tholen's report aptly describes how the CHASE HASF operates:

> The federal government recognizes that a state's portion of Medicaid financing can come from multiple sources; including provider fees. The [CHASE HASF] is a financing mechanism that allows the state to reduce the level of under-reimbursement and expand Medicaid eligibility. The reduction of under-reimbursement of Medicaid and an expansion of Medicaid eligibility reduces the cost of service to patients with private insurance as the cost shift is reduced.

Id. at 6.

These facts and observations comport with the General Assembly's detailed legislative declaration in S.B.17-267, codified at C.R.S. § 25.5-4-402.4(2).

III. ARGUMENT

S.B. 17-267 enjoys a presumption of constitutionality. Plaintiffs therefore face a "high burden" in their efforts to have this Court strike the statute down as unconstitutional. *TABOR Foundation v. RTD,* 2016 COA 102 ¶ 60. That burden requires Plaintiffs to prove that the statute is unconstitutional beyond a reasonable

doubt. *Sch. Dist. No. 1 v. Masters*, 2018 CO 18 ¶ 14; *Colorado Union of Taxpayers Foundation v. City of Aspen*, 2018 CO 36, ¶¶ 13-14. And "looming large over every such TABOR analysis is the caution against interpreting TABOR in a way that would 'cripple the government's ability to function.'" *RTD*, 2016 COA 102 at ¶ 49. The remedies Plaintiffs seek here include requiring the State to conjure up hundreds of millions of dollars or more that have already been spent on important health care services for Colorado's poor citizens, in order to instead distribute that money as tax refunds. The mind-boggling amounts at issue leave no doubt that Plaintiffs' proposed remedies would cripple the government's ability to function.

While none of the Plaintiffs' claims seek direct monetary relief from CHA or its member hospitals, CHA is particularly concerned about the Court's analysis of CHASE as an ongoing enterprise. CHA will therefore leave defense of the prior CHCAA HPF, as implemented by the General Assembly from FY 2009-2010 through enactment of CHASE in 2017 via S.B. 17-267, to the State Defendants. CHA therefore does not address claims 1-3 of the Second Amended and Supplemental Complaint, which challenge the operation of prior years' hospital provider fee, but instead focuses its argument on the claims directed at CHASE and the CHASE HASF.

A. Claim 4: CHASE is not an unlawful enterprise.

In one of its first decisions addressing the implementation of TABOR, the Colorado Supreme Court noted that TABOR "places limits on the growth of

government revenues, without prior voter approval, as a whole. It does not, however, forbid the dedication of a part of that whole to a specific purpose." *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 8 (Colo. 1993) (resolving immediate post-TABOR conflict between TABOR limitations and constitutional provision dedicating lottery proceeds to parks and outdoors).

CHASE does precisely what the Colorado Supreme Court has held for decades to be permissible under TABOR: CHASE generates a stream of government revenue via the CHASE HASF, uses federal matching funds to amplify that revenue, and dedicates that amplified revenue stream to a specific purpose: supporting Colorado's hospitals in their mission to provide quality, affordable health care to all Colorado citizens, including the especially difficult-to-serve populations in Colorado's rural communities. *See* C.R.S. § 25.5-4-402.4(2) (legislative declaration). As the Colorado Supreme Court recently confirmed in *City of Aspen*, this is a fee under TABOR, not a tax. 2018 CO 36, ¶26 (charges imposed to raise revenue for the general expenses of government are taxes, whereas charges imposed as part of a comprehensive regulatory scheme, to defray the reasonable direct and indirect costs of providing public services under that scheme, are fees).[1]

[1] Plaintiffs' narrower concept of fees is arguably supported by the three dissenting justices in *City of Aspen* who would, like Plaintiffs, interpret fees narrowly and taxes broadly under TABOR. However, that dissenting view is not the law. The majority opinion in *City of Aspen* provides the binding interpretation of these undefined terms that this Court must follow.

1. CHASE revenue is dedicated for supporting hospitals and health care.

Plaintiffs first argue that the CHASE HASF is a tax subject to TABOR, rather than a fee, because it is used to fund "general expenses of government." Second Amended and Supplemental Complaint at ¶¶ 27, 41, 42, 47, 51, 56, 92, 112, 128, 144 (allegations regarding the CHASE HASF fee and the prior CHCAA HPF). Plaintiffs' mantra-like repetition of this position does not make it so. To the contrary, the legislation creating CHASE expressly provides that the revenue stream generated is not used for general expenses of government, but may be used only to provide defined business services to hospitals. C.R.S. § 25.5-4-402.4(4)(a)(I) – (IV). Further, the detailed legislative declaration expressly states that:

> the healthcare affordability and sustainability fee charged and collected by the Colorado healthcare affordability and sustainability enterprise **is a fee, not a tax**, because the fee is imposed for the **specific purposes** of allowing the enterprise to defray the costs **of providing the business services … to hospitals** that pay the fee and is collected at rates that are reasonably calculated based on the benefits received by those hospitals.

C.R.S. §25.5-4-402.4(2)(f) (emphases added).

This express statement of legislative intent may not be second-guessed by a court. The Colorado Supreme Court has held that such a statement of legislative intent is not just persuasive, but actually binding on courts engaging in statutory construction:

> In construing the scope and effect of a statute we seek out the intent of the legislature in voting its passage. Perhaps the **best guide to intent** is the declaration of policy which frequently forms the initial part of an enactment. … When the purpose of an act is expressed in clear and

> unambiguous terms, this **must be accepted** as the solemn declaration of the sovereign. The public policy of the state is a matter for the determination of the Legislature and not for the courts.

St. Luke's Hospital v. Indus. Comm'n, 349 P.2d 995, 997-88 (Colo. 1960) (emphases added, citations omitted). This strong – indeed mandatory – deference to a legislative declaration in determining legislative intent has not been abandoned in the TABOR era. *Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 555 (Colo. 1998) (determining legislative intent based on legislative policy declaration included in legislation), citing *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246, 252 (Colo. 1996), citing *St. Luke's Hospital*.[2]

Plaintiffs offer no evidence suggesting that any portion of funds collected by the CHASE HASF is used for purposes other than supporting hospitals and health care. That is precisely the sort of dedication of a specific government revenue stream for a specific purpose that comports with TABOR. *See Senate Bill 93-74*. 852 P.2d at 8; *City of Aspen*, 2018 CO 36, ¶26; *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) ("Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or

[2] Of course, this is not to suggest that a court must defer to a legislature's declaration or opinion of a statute's constitutionality. The judiciary traditionally has the last word regarding constitutionality of a statute, subject to prudential constraints such as the political question doctrine. *E.g. Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 205-06 (Colo. 1991). Absent such a strong reason to avoid addressing a question of constitutionality at all, the law permits courts to determine a statute's constitutionality – subject to the strong presumption of constitutionality and requirement that courts take the General Assembly at its word regarding legislative intent. *TABOR Foundation v. RTD, supra*; *St. Luke's Hospital*, *supra*.

property for the purpose of defraying the cost of a particular governmental service.").[3]

Plaintiffs' contrary position was most recently considered and rejected in the apposite case of *TABOR Foundation v. Colorado Bridge Enterprise*, 2014 COA 106. There, the General Assembly created the Colorado Bridge Enterprise as a government-owned business that repairs and replaces designated bridges with money collected from a bridge safety surcharge tacked onto vehicle registration fees and supplemented by federal funds. 2014 COA 106 ¶¶ 3-10. The Court of Appeals held that this bridge safety surcharge was a fee, not a tax, because the surcharge was not used for governmental expenses generally, but for a particular government service: repairing and maintaining bridges. *Id.* at ¶¶32-34. The surcharge did not lose its status as a fee even though there was no direct correlation between those who paid the fee and those who used the Enterprise's bridges. *Id.* at ¶¶ 35-46. The fact that some payers of the fee never used the Enterprise's bridges did not turn the fee into a general purpose tax.

The CHASE HASF is parallel to the bridge fee in *Colorado Bridge*. Hospitals pay the fee to CHASE, that revenue stream is amplified with federal matching

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[3] *Barber* further makes clear that "the transfer of fees from a cash fund to a general fund does not alter the essential character of those fees as fees." *Barber*, 196 P.3d at 241-42. Accordingly, even if some portion of the CHASE HASF, or the prior CHCAA HPF, were to have been transferred into the general fund, the hospital provider fee would not lose its character as a fee and become a tax as a result.

funds, and the resulting funds are used by CHASE to support hospitals and the health care services they provide, not to pay any other expenses of government.

2. The use of the word "tax" in the related federal regulation does not make the CHASE fee a tax for TABOR purposes.

Plaintiffs next argue that the CHASE HASF must be a tax because, once collected from hospitals, the fee is used to obtain federal matching funds under Medicare regulations, including a regulation that uses the word "tax." Second Amended Complaint at ¶ 145, citing 43 C.F.R. § 433.68(b).

The phrase "health care related tax" in the federal regulations, however, is a term of art. Under the definition provided in the federal regulations, a "health care related tax" includes fees and assessments:

> § 433.55. Health care-related taxes defined
>
> (a) A health care-related tax is a **licensing fee, assessment, or other mandatory payment** that is related to-
>
> (1) Health care items or services;
>
> (2) The provision of, or the authority to provide, the health care items or services; or
>
> (3) The payment for the health care items or services.

42 C.F.R. § 433.55 (emphasis added). Accordingly, the mere use of the word "tax" in the federal regulations does not somehow turn the CHASE HASF into a tax for TABOR purposes. Like the bridge safety surcharge in *Colorado Bridge Enterprise*, the CHASE HASF was designed to be, and is, a fee – not a tax.

3. CHASE qualifies as a government-owned business.

Plaintiffs next argue that CHASE does not qualify as a government-owned business because it is not a "traditional" business – *i.e.* one that seeks to make profits through arms-length market transactions. SAC ¶ 148, citing to a 2015 Office of Legislative Legal Services Memorandum at 5-6.

Again, this precise argument was considered and rejected in *Colorado Bridge Enterprise*. There, the TABOR Foundation argued that the Bridge Enterprise could not be a business because it did not resemble an ordinary for-profit business engaging in arms-length market transactions for profit. *Id.* at ¶ 58. The Court of Appeals rejected this argument, holding that an enterprise need not conduct its business in such a traditional manner. Rather, as a government business, an enterprise may collect fees and use those fees to provide the sorts of services that governments properly provide. *Id.* at ¶¶ 59-60.

Government businesses naturally look different from traditional private for-profit businesses because they serve different purposes. Profit is the traditional raison d'être of any privately-run business. But state-run businesses exist to promote the primary function of state government, which is to protect the health, safety and welfare of its citizens – regardless of whether there is any profit to be made. *E.g.*, *People v. Hupp*, 53 Colo. 80, 85, 123 P. 651, 653 (1912) ("The welfare of the people is the supreme law" that drives all state government functions; so it "belongs to the legislative department to exert the police power of the state, and to

determine primarily what measures are appropriate and needful for the protection of the public morals, the public health or the public safety.").

The services that CHASE provides are quintessentially governmental because they fill a critical need (*i.e.*, providing necessary health care services and saving lives) that cannot be successfully addressed by pure market forces. If hospitals are treated as purely private businesses, then those located in more affluent urban or suburban areas, where users are numerous and tend to have better private insurance, might be able to generate enough profit from operations to be viable businesses without the need for any governmental intervention. But the extreme cost burdens of operating full-service hospitals with emergency departments in rural areas of the State, which have both lower usage and far lower revenue from private insurance, could well result in their failure as traditional private businesses. If Colorado is to sustain full-service hospitals with emergency departments in relatively poor and rural areas, the General Assembly is fully justified to remedy what would otherwise be a market failure. The General Assembly has most recently done this by creating CHASE, a state-run enterprise, to leverage significant amounts of available federal funding that is critical to operation of the state's hospitals in general, and the survival of rural hospitals in particular. *See* C.R.S. § 25.5-4-402.4(2)(f) (legislative declaration that CHASE is a business enterprise); *St. Luke's Hospital*, *supra* (legislative declaration is "best guide" to determining legislative intent).

The TABOR Foundation's citation to an OLLS memorandum supporting its position that CHASE cannot be an enterprise because it is not a traditional business also fails under the analysis of *Colorado Bridge*. There, the Court of Appeals considered and rejected a 1995 Attorney General opinion that viewed state-run enterprises in traditional business terms. *Id.* at ¶ 58. This Court should also reject the similar, non-binding OLLS memorandum to this effect. Additionally, the views of the Attorney General have now evolved in a different direction. Recently, and consistent with controlling case law such as *Colorado Bridge*, the Attorney General acknowledged that enterprises need not resemble traditional for-profit businesses, and that CHASE is therefore a perfectly legitimate government enterprise. *See* **Exhibit 2**, Attorney General Opinion 16-01, supporting the conclusion that CHASE is a proper government business and therefore eligible to become a TABOR-exempt enterprise.

B. Claim 5: Establishing CHASE did not violate TABOR's revenue limiting provisions.

Plaintiffs' fifth claim is that the General Assembly violated TABOR and Referendum C provisions applicable when the government establishes a former government service as a TABOR-exempt enterprise. Plaintiffs cite a 2015 OLS memorandum projecting that the CHCAA HPF would take in $600.6 million in FY 2017-18, and argue that establishment of the new CHASE HASF via S.B. 17-267 should allegedly have included a corresponding reduction to the State's Referendum C excess revenue cap. C.R.S. § 24-77-103.6(6)(b)(I).

The General Assembly, however, determined that CHASE was a newly created enterprise, rather than qualification of an existing government program such as the prior CHCAA HPF. Indeed, the General Assembly completely terminated the CHCAA HPF, emptied its account, archived its website communications, etc., before creating CHASE. *See* **Exhibit 1**, Tholen report at 4. Rather, the General Assembly deliberately created CHASE to perform additional services besides operating the prior CHCAA HPF (now replaced by the new CHASE HASF). As a result, the CHCAA HPF ended, and a new and different enterprise was created. Because CHASE is thus not a qualification of an existing government program, but instead is a new government-owned enterprise, no reduction to the Referendum C excess state revenue cap is required by TABOR or Referendum C, C.R.S. § 25.5-4-402. *See* C.R.S. § 25.5-4-402.4(3)(c)(I) (repealing and terminating the CHCAA HPF, and creating CHASE as a new enterprise with a distinct business model so that the TABOR and Referendum C revenue limits would not be impacted).

The General Assembly nonetheless chose to lower the excess revenue cap by $200 million for FY 2016-17. C.R.S. §§ 25.5-4-402.4(3)(c); 24-77-103.6(6)(b)(I)(C). While this determination may reflect a legislative compromise, that does not permit this Court to substitute its judgment or perception for the General Assembly's express legislation and statements of intent. The General Assembly's powers are at their zenith regarding the State's budget, appropriations, and taxes. *Colorado Gen.*

Assembly v. Lamm, 738 P.2d 1156, 1169 (Colo. 1987); *Qwest Corporation v. Colorado Division of Property Taxation*, 304 P.3d 217, 223 (Colo. 2013) ("The General Assembly has especially broad latitude in creating classifications and distinctions in tax statutes."). Courts must take the General Assembly seriously and at its word when reviewing the declaration explaining the General Assembly's legislative intent to terminate the CHCAA HPF and enact CHASE as a new enterprise. *St. Luke's Hospital*, *supra*. The General Assembly was crystal clear in how it viewed creation of CHASE, as well as the new enterprise's impact on the TABOR and Referendum C caps. The General Assembly deliberately terminated the prior CHCAA HPF and created CHASE to make it a wholly new enterprise, rather than a qualification of the previous CHCAA HPF program as an enterprise. The deferential standards of review and requirement of proof beyond a reasonable doubt prevent this Court from striking down this aspect of the General Assembly's exercise of its plenary power over the State budget as unconstitutional. *See Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d at 12 (Colo. 1993) (describing the General Assembly's "characterization" of lottery proceeds in a bill as a "reasonable resolution" of tensions between TABOR and another constitutional amendment, and deferring to that legislative resolution).

C. Claim 6: S.B. 17-267 does not violate the Colorado Constitution's single-subject requirement for statutes.

Plaintiffs' sixth and final claim in their Second Amended Complaint is that S.B. 17-267 violates Colorado Constitution Article V Section 21, which requires

statutes to have a single subject. Plaintiffs argue that S.B. 17-267 addresses too many discrete subjects to be unified under any single description. Second Amended Complaint at ¶¶ 175-179. Plaintiffs surmise that S.B. 17-267 was the result of legislative "log rolling" that the single-subject requirement was designed to prevent, and is therefore allegedly unconstitutional. *Id.* at ¶¶ 180-82.

1. Background and authority controlling the Court's single subject analysis.

Before addressing the merits of Plaintiffs' single-subject challenge, the Court should carefully consider which case law and authority controls its analysis.

The Colorado Constitution has two single-subject provisions: Article V Section 21 for statutes, and Article V Section 1(5.5) for ballot initiatives that seek to alter the State Constitution through popular referendum. Section 21 is an original provision of the Colorado Constitution, modeled on similar constitutional provisions from other states. *See Catron v. Board of Com'rs of Archuleta County*, 33 P. 513, 514 (Colo. 1893). The Colorado Supreme Court therefore considers other states' analyses of their comparable constitutional provisions as persuasive authority in interpreting Section 21. *See In re House Bill No. 1353*, 738 P.2d 371, 372 (Colo. 1987), citing 1A Sutherland Statutory Construction §§ 17:1-2 (7th ed.) (reviewing state constitutional single-subject requirements).

Section 1(5.5), by contrast, is unique to Colorado. It was added to the Constitution through legislative referral in 1994 in the wake of upheaval wrought by TABOR. *Matter of Title, Ballot Title, Submission Clause, and Summary*

Adopted April 5, 1995, by Title Board Pertaining to a Proposed Initiative Public Rights in Waters II, 898 P.2d 1076, 1078 (Colo. 1995).[4]

While cases interpreting the recent Section 1(5.5) borrow from the well-developed body of case law interpreting Section 21, the fact remains that Section 1(5.5) addresses a completely different law-making process. The Colorado General Assembly has been functioning since territorial days, and draws on centuries of Anglo-American legislative and parliamentary practice and tradition. The process of constitutional amendment by direct citizen initiative, by contrast, is relatively novel, and Colorado's mechanism for the initiative process is unique. As a result, courts should not necessarily approach these distinct provisions identically. For example, when ordinary citizens vote on a proposed constitutional amendment by initiative, they generally don't engage in the sort of horse-trading with other citizens that legislators do among themselves, and which has been recognized as part and parcel of the legislative process in enacting statutes. *Catron*, 33 P. at 514. Also, members of the General Assembly have a better and deeper understanding of how proposed legislation interacts with existing provisions of the State's Constitution, statutes, regulations, and governmental structures than the average citizen. And there is a no dearth of case law addressing Section 21's single-subject requirement for statutes, requiring courts to borrow from more recent Section 1(5.5)

[4] The purpose of adopting a constitutional single-subject requirement for constitutional initiatives was in large part to prevent further sweeping constitutional amendments like TABOR. *Id.* at 1079.

jurisprudence to address Section 21 challenges. The proliferation of Section 1(5.5) case law mostly reflects how easy it has been to amend Colorado's Constitution, and the resulting popularity of citizen initiatives.

Thus, the surface similarities of the two constitutional amendments notwithstanding, there is no need and no reason for the Court to look to Section 1(5.5) case law on citizen ballot initiatives when considering Section 21 constitutional challenges to statutes.

Next, the Court should consider that Section 21 has been a constitutional provision from statehood, and cases interpreting the provision go back to the nineteenth century. The Supreme Court has recently noted that Section 21 "appeared in our state's first constitution and is still there today"; and the Court still routinely cites century-old cases applying the provision. *E.g. In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #'43*, 46 P.3d 438, 440 (Colo. 2002) (citing three early cases: *In re Breene*, 24 P. 3 (Colo. 1890); *Catron*; and *People ex rel. Elder v. Sours*, 74 P. 167 (Colo. 1903)).

While modern readers may tend to avoid these early opinions because they are written in an old-fashioned style, absent being overruled or limited the older Supreme Court cases are no less authoritative than modern cases. The older cases can be thorough and enlightening in their analysis of the Constitution's single-subject requirement. *See Catron*, *supra*. Additionally, the older cases have the virtue of having been written closer in time to enactment of the Colorado

Constitution, and may thereby provide better insight into the original intent of the framers of the single-subject requirement.

With this background in mind and sources of authority clarified, CHA turns to Plaintiffs' single-subject challenge.

2. S.B. 17-267 addresses a single subject: the sustainability of rural Colorado.

The stated subject of S.B. 17-267 is to "ensure and perpetuate the sustainability of rural Colorado" by addressing specific "demographic, economic, and geographical challenges" such as an "older population that requires more medical care," lower wages and incomes than urban areas, and greater distances and less adequate transportation infrastructure than urban areas. S.B. 17-267, § 1 (legislative declaration). This is a coherent subject for legislation, and the Court is required to accept this declaration of legislative intent at face value. *St. Luke's Hospital*, *supra*. As with all legislation, the Court presumes that the General Assembly understands the constitutional single-subject requirement and would not intentionally violate it, creating a presumption of constitutionality that Plaintiffs must overcome through proof beyond a reasonable doubt. *TABOR Foundation v. RTD,* 2016 COA 102 ¶ 60. This Court should be mindful that S.B. 17-267 is complex and detailed legislation addressing the state budget – an area where the General Assembly's powers are at their greatest, and where courts are appropriately deferential. *Colorado Gen. Assembly v. Lamm*, 738 P.2d at 1169; *Qwest*, 304 P.3d at 223. Further, "looming large over every such TABOR analysis is

the caution against interpreting TABOR in a way that would 'cripple the government's ability to function.'" *TABOR Foundation v. RTD,* 2016 COA 102 at ¶ 49.

Plaintiffs argue that the purpose of Section 21's single-subject requirement is to prevent "log rolling," described as the practice of jumbling together in one act incongruous subjects to unite minorities and insure the passage of an "omnibus" piece of legislation. Second Amended Complaint at ¶ 180, citing *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1383 (Colo. 1985). Plaintiffs point to the number of different subjects of legislation included in S.B. 17-267 as evidence that the bill involves log rolling, and therefore violates the single subject requirement. *Id.* at ¶ 178.

While preventing the practice of "log rolling" is often cited as an animating principle of Section 21, a close reading of authoritative case law illuminates the practical role of this practice in the legislative arena, and holds that log rolling does not necessarily render a bill constitutionally infirm. *See Catron*, *supra.* In *Catron*, a taxpayer lost his challenge to a tax assessment, and the county commissioners persuaded the Court of Appeals to dismiss the taxpayer's appeal because the statute authorizing tax challenges and appeals supposedly contained more than one subject, (*i.e.*, tax challenges and appeals). 33 P. at 513.[5] In taking up the matter,

[5] The nineteenth century was a more formalistic time; it was not uncommon for litigants to challenge laws based on what would appear today as hypertechnical arguments.

the Supreme Court provided a thorough and illuminating discussion of the history, nature and purpose of the Colorado Constitution's single-subject requirement.

The Supreme Court first discussed how titles of bills were historically deemed unimportant, and typically created by the clerk of the legislative body. *Id.* at 514. But as the need for courts to engage in statutory construction became more common, bill titles became more important, and many states enacted single-subject requirements in their constitutions to insure clear and descriptive bill titles aiding courts in construing such laws. *Id.*

The Court then discussed three purposes served by such single-subject requirements:

- preventing "logrolling";
- preventing "surprise and fraud from being practiced upon legislators"; and
- providing notice to the public regarding the topics of legislation, so citizens can better participate in the legislative process.

Id.

In a key (and often overlooked) passage, the Supreme Court discussed how "logrolling" cannot be prevented as a practical matter, since horse-trading for votes is part and parcel of the legislative process. Nonetheless, the single subject rule was still useful to put legislators and their constituents on notice of the content of legislation:

> So far as the first of the above evils [logrolling] is concerned, unfortunately, neither this nor any other provision yet devised upon the subject has produced the desired result. Even a casual

> investigation into the methods a adopted by modern legislators will show that the passage of any bill upon its intrinsic merits is of rare occurrence, logrolling being as successfully carried on to secure the passage of a number of bills upon different subjects as if the same legislation could as formerly be included in a single bill. **The constitutional provision, it is believed, however, does furnish a remedy for the other evils against which it is directed.** Speaking generally of this provision, it is to be observed that it was not designed to hinder or unnecessarily obstruct legislation; but, to prevent its having this effect, it must have a reasonable and liberal construction. When so construed, it is neither unreasonable nor difficult to comply with it.

Id. (emphasis added). In other words, "log rolling" is simply an aspect of modern legislative practice that cannot be prevented (per the underlined text). Thus, the value of the constitutional single subject requirement remains in providing notice of the subjects of legislation, so legislators and the public can properly participate in the lawmaking process (per the bolded text).

The Court then explained that, as a result, deliberately broad titles are not problematic but are actually a good thing:

> The general assembly may, within reason, make the title of a bill as comprehensive as it chooses, and thus cover legislation relating to many minor, but associated, matters…. [It is thus] manifest that the **generality of a title is oftener to be commended than criticised**, the constitution being sufficiently complied with so long as the matters contained in the bill are directly germane to the subject expressed in the title. Legislators frequently, and sometimes good lawyers, fall into the mistake of entering into particulars in the title, thereby curtailing the scope of the legislation which might properly be enacted within the limits of a single act.

Id. (emphasis added), quoting *In re Breene,* 24 P. at 4 (emphasizing notice function of single-subject requirement, and approving broader titles).

This authoritative discussion of Section 21 has never been overruled, repudiated, or even questioned by the Colorado Supreme Court – the only court with authority to do so. *E.g. People v. Novotny*, 2014 CO 18, ¶ 26 (the Colorado Supreme Court "alone can overrule [its] prior precedents concerning matters of state law"). *Catron*'s explication of the single subject requirement is also fully consonant with the leading treatise on the matter, Sutherland's Statutory Construction:

> [Single subject] provisions are primarily directed at the legislative process and intended primarily to prevent surprise and stealth. Where the "one subject" requirement is present all matter treated by one piece of legislation which is reasonably germane to one general subject or purpose is considered valid.

1A Sutherland Statutory Construction § 17:1 (7th ed.). The modern Colorado Supreme Court continues to cite the Sutherland treatise as authoritative on this issue. *See In re House Bill No. 1353*, 738 P.2d at 372, citing Sutherland.

While some recent case law discussing *Catron* notes how the constitutional single-subject requirement was originally intended to prevent log rolling, these cases overlook *Catron*'s holding that this is not possible without improper judicial interference into the legislature's practices, so that the remaining purpose of Section 21 is to insure notice to legislators and the public.

Additionally, nearly all modern cases discussing log rolling are not Section 21 cases – they are Section 1(5.5) cases addressing ballot initiatives. As discussed, this constitutional provision requiring single subjects for ballot initiatives has an

entirely different backstory: it was enacted in 1994, in the wake of TABOR to regulate enactment of other constitutional amendments like TABOR via citizen initiative. *See Matter of Title,* 898 P.2d at 1078-79. While citizens generally don't engage in horse-trading with other citizens when voting on ballot initiatives as legislators do when voting on statutes, the General Assembly and Supreme Court have recognized how overbroad constitutional citizen initiatives can wreak havoc with the mechanisms of state government, which was the very problem caused by TABOR, leading to the referral and adoption of Section 1(5.5). *Id.* But when it comes to Section 21 and bills in the General Assembly, *Catron* remains authoritative on the topic of log rolling.

Plaintiffs' argument that the various topics addressed in S.B. 17-267 must violate the single-subject requirement thus fails under *Catron*, as well as persuasive authority from other state supreme courts interpreting their similar single subject requirements. Plaintiffs argue that hospital funding has nothing to do with, *e.g.*, school funding or road maintenance funding. Second Amended Complaint at ¶ 178. But as the leading treatise on state constitutional single-subject requirements confirms, the question is not whether all the provisions of a bill relate to each other. Rather, the question is whether all the provisions of a bill relate to the bill's subject:

> "A "common purpose" or relationship may exist between topics in a statute. Where there is no blatant disunity among the provisions of a bill and there is a rational purpose for their combination in a single enactment, the act will be held valid. **Where there is any reasonable basis for grouping various matter of the same nature together in one**

> **act, and the public cannot be deceived reasonably, the act does not violate the single subject requirement.**

Sutherland § 17:2 at notes 4-6 (emphasis added). *Accord, e.g., People v. Boclair*, 789 N.E.2d 734, 748 (Ill. 2002) ("The dispositive question is, however, not whether amendments relate to each other; rather, the issue is whether they relate to a single subject.").

The Colorado Supreme Court has recognized a limit on the breadth of legislation for single-subject requirement purposes under Section 21. In *In re House Bill No. 1353*, the Supreme Court answered Governor Romer's interrogatory by holding that a bill titled "Concerning An Increase In The Availability Of Moneys To Fund Expenditure Priorities . . . ." violated Section 21 because raising and spending money was too broad a subject for a single bill, unless it is a general appropriation bill like the annual long bill. General appropriation bills are expressly exempted from the single-subject requirement because such bills must address multiple topics, and the legislature must pass them to keep government running. 738 P.2d at 374-74.

This Court is bound by *Catron*, and can harmonize *Catron* with the recent and equally authoritative case of *In re House Bill No. 1353*. Taken together, *Catron* and *In re House Bill No. 1353*, supplemented by the Sutherland treatise and cases from other states that it collects, provide a coherent, logical, and controlling framework for applying Section 21's single-subject requirement to General

Assembly bills (and not ballot initiatives, which present an entirely different situation). The authorities, read together, provide:

- Log rolling cannot be prevented. *Catron*.
- Broader, more comprehensive titles are therefore a good thing, because they provide better notice of the contents of legislation to legislators and the public. *Catron*, Sutherland.
- How broad is too broad? Bills about raising and spending money. That is the subject of appropriations bills, which are exempted from the single-subject requirement and have their own unique legislative process. *House Bill No. 1353*.

Considered in this authoritative framework, Plaintiffs' single subject challenge to S.B. 17-267 fails. Sustainability of rural Colorado may be a broad topic, but it is less broad than raising and spending money. The proper question is not whether all the provisions in S.B. 17-267 relate to each other, but whether they all relate to the sustainability of rural Colorado, which they do.

Per *Catron*, the legislative process is sausage making, and the purpose of Section 21 vis-à-vis S.B. 17-267 is to provide notice to legislators and the public about ingredients in the legislative sausage. Given the General Assembly's current use of twenty-first century media, such as its excellent website making the text of proposed legislation and official commentary immediately available to all, Plaintiffs cannot plausibly contend that legislators or the public lacked notice or were surprised by the scope of the bill.

The concerns of Article V Section 21's single-subject requirement are therefore fully satisfied in this matter.

IV. CONCLUSION

Plaintiffs have failed to establish beyond a reasonable doubt any constitutional infirmities with the CHASE HASF or S.B. 17-267 that created it. The Court should therefore enter summary judgment against Plaintiffs and in favor of the State Defendants and CHA.

Dated: July 16, 2018.

POLSINELLI PC

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CERTIFICATE OF SERVICE

I certify that on July 16, 2018, the foregoing was served on all parties to this action via Colorado Courts E-Filing or by U.S. mail.

*/s/*_____
Polsinelli PC