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DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO
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Denver, Colorado 80202

TABOR FOUNDATION, a Colorado non-profit corporation; COLORADO UNION OF TAXPAYERS FOUNDATION, a Colorado non-profit corporation; REBECCA R. SOPKIN, an individual; and JAMES S. RANKIN, an individual;
Plaintiffs,
v.

COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING; COLORADO HEALTHCARE AFFORDABILITY AND SUSTAINABILITY ENTERPRISE; KIM BIMESTEFER, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; COLORADO DEPARTMENT OF THE TREASURY; WALKER STAPLETON, in his official capacity as Colorado State Treasurer; and the STATE OF COLORADO;
Defendants,
and

COLORADO HOSPITAL ASSOCIATION
Defendant-Intervenor.

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Div.: 275

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Under Colorado Rule of Civil Procedure 56(a), Plaintiffs respectfully move the Court for summary judgment on the claims in their Second Amended and Supplemented Complaint.

INTRODUCTION

On all three of the central issues in this case—whether the hospital provider charge is a fee or a tax, whether the single-subject requirement was violated, and whether the excess state revenues cap was violated—the General Assembly wrongly attempted to elevate form over substance to avoid its duties and constraints under the Taxpayer's Bill of Rights ("TABOR").

In 2009, the General Assembly authorized Defendant Department of Health Care Policy and Financing (the "Department") to levy the Hospital Provider Charge. The purpose of this charge was to artificially inflate hospital costs to increase the amount of federal matching funds available under Medicaid. This charge was a "new tax" levied in violation of TABOR because it was not a fee-for-service transaction, was not reasonably related to the costs of providing a service, and was levied without the requisite TABOR vote.

In 2017, the General Assembly enacted Senate Bill 17-267 ("SB 17-267") under the pretense of addressing the sustainability of rural Colorado. But the bill was enacted in violation of the Colorado Constitution's single-subject requirement because its substantive provisions were not directly related to that purpose.

In addition to numerous unrelated provisions, SB 17-267 created Defendant Colorado Healthcare Affordability and Sustainability Enterprise ("CHASE") as an allegedly TABOR-exempt enterprise. But the General Assembly failed to create a valid enterprise because it gave CHASE the power to levy a tax when it transferred administration of the Hospital Provider Charge—now the Healthcare Charge—to its control.

Even if the Court were to find that SB 17-267 did not violate the single-subject requirement and that the Healthcare Charge is not a tax, and thus CHASE is a TABOR-exempt enterprise, SB 17-267 nonetheless violated the "state excess revenues cap" because the General Assembly used the bill to convert the authority to levy a revenue stream subject to TABOR from the Department to CHASE without a corresponding downward adjustment to the cap.

The people of Colorado adopted TABOR as part of their Constitution because they sought to restrain the growth of government and its ability to levy taxes without their direct consent. In this case, the General Assembly tried to evade those constraints by elevating form over substance. The Court must not allow that evasion to stand.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. The Medicaid Program.

1. Medicaid is a federal-state program that provides federal matching funds to states that have adopted the program. 42 U.S.C. § 1396a. The federal government pays states participating in Medicaid matching funds equal to a percentage of the total amount spent by a state on its Medicaid program. *Id*. § 1396b.

2. Federal regulations provide that a state may receive federal matching funds for "health care-related taxes" levied by the state, but only if those taxes are broad based and uniformly imposed, and the state's "tax program" does not violate the hold harmless provisions in the regulations. 42 C.F.R. § 433.68(a), (b).

3. The hold harmless provisions of 42 C.F.R. § 433.68 provide that a state cannot, among other things, provide for any direct or indirect payment, offset, or waiver to hold hospitals harmless for all or any portion of the tax paid. *Id*. § 433.68(f)(3).

4. Federal regulations further provide that a state may request a waiver of the broad-based and/or uniform tax requirements if it can demonstrate that the net impact of the tax and associated payments is "generally redistributive." *Id.* § 433.68(e). This means a state may be eligible for a waiver if it shows some of its hospitals will make money and some of its hospitals will lose money under its program.

II. House Bill 09-1293 and the Hospital Provider Charge.

5. House Bill 09-1293 ("HB 09-1293") was enacted in 2009 and authorized the Department to levy the Hospital Provider Charge. Second Am. & Supplemented Compl. ¶ 25.

6. The state did not hold a TABOR vote before it levied the Hospital Provider Charge. Answer to Second Am. & Supplemented Compl. ¶ 42.

7. The General Assembly estimated the Hospital Provider Charge would raise $389.5 million in FY 2010–11, Ex. 3 at 1, and it in fact raised $441 million. Ex. 5 at 11.

8. The stated purpose of the Hospital Provider Charge was to secure a higher amount of Medicaid matching funds from the federal government by increasing the cost of certain hospital services. Ex. 12 at 1; 2009 Colo. Sess. Laws 634.

9. HB 09-1293 authorized the Department to seek a waiver from the federal government to exempt certain hospitals from paying the charge. The Department did seek, and the federal government did provide, such a waiver. Ex. 13.

10. In granting the waiver, the Centers for Medicare and Medicaid Services ("CMS") determined that the Hospital Provider Charge qualified as a "health care-related tax" for purposes of 42 C.F.R. § 433.68(b), that the "net impact of the tax is generally redistributive[,]" and that "the amount of the tax is not directly correlated to Medicaid payments." Ex. 13 at 1.

11. Every year since 2011, the Hospital Provider Fee Oversight and Advisory Board, and now the CHASE Board, has issued a report summarizing the charges collected from and payments made to hospitals. Exs. 4–11. According to these reports:

a. In six out of seven years, Littleton Adventist Hospital received fewer dollars in payments than it paid in charges, for a net loss of $21.9 million.

b. In every year, Good Samaritan Medical Center received fewer dollars in payments than it paid in charges, for a net loss of $30.4 million.

c. In every year, Porter Adventist Hospital received fewer dollars in payments than it paid in charges, for a net loss of $25.2 million.

d. In six out of seven years, Parker Adventist Hospital received fewer dollars in payments than it paid in charges, for a net loss of $12.8 million.

e. In every year, SkyRidge Medical Center received fewer dollars in payments than it paid in charges, for a net loss of $59.3 million.

f. In every year, OrthoColorado Hospital paid charges but never received any payment, for a net loss of $8.9 million.

g. In FY 2016–17, the only year it was reported in the program, Broomfield Hospital received fewer dollars in payments than it paid in charges, for a net loss of $138,939.

12. Every year since 2011, the Hospital Provider Fee Oversight and Advisory Board, and now the CHASE Board, reported the payments made to hospitals that are statutorily exempt from paying the Hospital Provider Charge. Exs. 4–11. According to these reports:

a. From FYs 2009–17, Craig Hospital paid no charges but received $7,008,341 in payments.

b. From FYs 2009–17, HealthSouth Rehabilitation Hospital - Colorado Springs paid no charges but received $1,718,272 in payments.

c. From FYs 2009–17, Northern Colorado Rehabilitation Hospital paid no charges but received $1,013,681 in payments.

d. From FYs 2009–17, Spalding Rehabilitation Hospital paid no charges but received $992,428 in payments.

e. From FYs 2009–17, Vibra Long-Term Acute Care Hospital paid no charges but received $735,355 in payments.

f. From FYs 2009–17, HealthSouth Rehabilitation Hospital - Denver paid no charges but received $487,318 in payments.

g. From FYs 2009–17, Colorado Acute Long-Term Hospital paid no charges but received $484,444 in payments.

h. From FYs 2009–17, Kindred Hospital - Aurora paid no charges but received $314,529 in payments.

i. From FYs 2009–17, Kindred Hospital paid no charges but received $219,453 in payments.

j. From FYs 2009–17, Select Specialty Hospital - Denver paid no charges but received $78,937 in payments.

k. From FYs 2009–17, Kindred Hospital - Denver South paid no charges but received $63,858 in payments.

l. From FYs 2009–17, Triumph Hospital paid no charges but received $29,844 in payments.

m. From FYs 2009–17, Northern Colorado Long-Term Acute Care Hospital paid no charges but received $26,809 in payments.

n. From FYs 2009–17, Kindred Hospital - Colorado Springs paid no charges but received $12,608 in payments.

o. From FYs 2009–17, Select Long-Term Care Hospital paid no charges but received $11,395 in payments.

13. Every year since 2011, the Hospital Provider Fee Oversight and Advisory Board, and now the CHASE Board, has reported administrative costs, other program expenditures, and charges collected in the program. Exs. 4–11. According to these reports:

a. In FY 2009–10, the Department's administrative costs were $2.9 million and it collected approximately $300 million in charges.

b. In FY 2010–11, the Department's administrative costs were $5.7 million and it collected approximately $441 million in charges.

c. In FY 2011–12, the Department's administrative costs were $15.8 million and it collected approximately $585.7 million in charges.

d. In FY 2012–13, the Department's administrative costs were $17.6 million and it collected approximately $651.7 million charges.

e. In FY 2013–14, the Department's administrative costs were $25.4 million and it collected approximately $566 million in charges.

f. In FY 2014–15, the Department's administrative costs were $38.3 million and it collected approximately $529 million in charges.

g. In FY 2015–16, the Department's administrative costs were $46.4 million and it collected approximately $804 million in charges.

h. In FY 2016–17, the Department's administrative costs were $59.5 million and it collected approximately $654 million in charges.

i. In total, from FYs 2009–17, the Department's administrative costs were $211.7 million and it collected approximately $4.5 billion in charges.

14. From FYs 2009–17, the Department's, and now CHASE's, annual reports reveal a total of more than $6 billion in Hospital Provider Charge expenditures for "expansion populations." Exs. 4–11.

15. Department "Hospital Provider Fee Expenditures" identified as "expansion populations" on Department annual reports were distributed between both hospitals that paid the Hospital Provider Charge and health services providers that did not pay the charge. Ex. 17 at 22; Ex. 18 at 8; Ex. 19 (Burnett Dep. 82:4–18).

III. Senate Bill 17-267, CHASE, and the Healthcare Charge.

16. On May 30, 2017, Governor Hickenlooper signed SB 17-267 into law, creating CHASE and authorizing it to levy the "healthcare affordability and sustainability fee" ("Healthcare Charge"). Ex. 1 at 59.

17. SB 17-267 is not a general appropriations bill. Answer to Second Am. & Supplemented Compl. ¶ 79.

18. The Hospital Provider Charge raised $656.6 million in FY 2016–17. Ex. 2 at 5.[1]

19. The Hospital Provider Charge was projected to raise $600.6 million in FY 2017–18. Ex. 2 at 5.

20. The state did not hold a TABOR vote before levying the Healthcare Charge. Second Am. & Supplemented Compl. ¶ 52; Answer to Second Am. & Supplemented Compl. ¶ 52.

21. "Administrative expenditures for [FY] 2017–18 for the CHASE will be available and reported in the next annual report on January 15, 2019." Ex. 11 at 6.

22. Before SB 17-267, the revenue raised by the Hospital Provider Charge was subject to the TABOR limit. Ex. 2 at 5.

23. Between the June 27, 2017 Hospital Provider Fee Oversight and Advisory Board meeting, the last meeting prior to the creation of CHASE, and the August 22, 2017 CHASE Board meeting, the first following its creation, none of the thirteen board members changed. Exs. 15–16. And none of them needed to be reappointed. Ex. 15 at 2.

PROCEDURAL HISTORY

On June 26, 2015, the TABOR Foundation filed a complaint against the Colorado Departments of Health Care Policy and Financing and the Treasury, as well as the heads of those departments in their official capacities. Compl. ¶¶ 4–7. The complaint alleged, among other

[1] Although the amount of revenue raised cited in paragraphs 13.h and 18 differs by $2.6 million, Plaintiffs have accurately quoted the figures in the reports prepared by the CHASE Board and Colorado Legislative Council Staff, respectively. This small discrepancy in the reported figures does not materially affect any arguments presented below.

things, that the Hospital Provider Charge was a tax levied in FYs 2011–13 without the TABOR-required vote and was thus unconstitutional. *Id.* ¶¶ 24–58. On September 2, 2015, Defendants filed a motion to dismiss, arguing the TABOR Foundation did not have standing, had failed to state a claim, and that the Department of the Treasury and the Treasurer were not proper parties. In September and October 2015, the parties briefed Defendants' motion to dismiss.

In the 2017 legislative session, the General Assembly made changes to the state's administration of the Hospital Provider Charge when it enacted SB 17-267. On June 30, 2017, the TABOR Foundation sought, and the Court granted, leave to amend and supplement its complaint to account for those changes. *See* First Am. & Supplemented Compl. One relevant statutory change was the creation of CHASE as an enterprise to administer the charge. The TABOR Foundation added CHASE and the state of Colorado as new Defendants. *Id.* ¶¶ 5, 9. The TABOR Foundation also added claims alleging that: (1) the Hospital Provider Charge violated TABOR in FYs 2013–17, (2) CHASE was an unlawful enterprise, (3) SB 17-267 violated the "excess state revenues cap," and (4) SB 17-267 violated the Colorado Constitution's single-subject requirement. *Id.* ¶¶ 110–57. In September and October 2017, the parties supplemented their briefing on Defendants' motion to dismiss.

On September 23, 2017, the Colorado Hospital Association moved to intervene. On December 11, 2017, following briefing from the parties, the Court granted the motion.

On December 19, 2017, the TABOR Foundation sought, and the Court granted, leave to file a second amended and supplemented complaint. The TABOR Foundation added three new Plaintiffs to the case: the Colorado Union of Taxpayers Foundation; Rebecca R. Sopkin, a TABOR Foundation member; and James S. Rankin. Second Am. & Supplemented Compl. ¶¶ 5–

7. The TABOR Foundation did not add new claims for relief. In February and March 2018, the parties further supplemented their briefing on Defendants' motion to dismiss.

LEGAL STANDARD

I. Motion for Summary Judgment

The court shall grant a party's motion for summary judgment if the movant establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). The moving party has the "burden . . . to establish the lack of a genuine issue of fact." *Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 523 (Colo. App. 2008) (citing *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo. 1995)). The movant may use "pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits" to meet its burden. C.R.C.P. 56(c). The court also may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," C.R.E. 201(b)(2), such as items in the public record and government publications. *See Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (collecting cases).

If the movant meets the "initial burden of production" then "the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact." *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009) (citation omitted). In opposition, "the nonmoving party may not rest on mere allegations or demands in its pleadings but must provide specific facts demonstrating a genuine issue for trial." *Hardegger v. Clark*, 403 P.3d 176, 180 (Colo. 2017) (citation omitted).

When evaluating a motion for summary judgment, the court gives "the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts and resolves all doubts against the moving party." *Id.* (citation omitted). An issue is "genuine" and a fact is "material" if its resolution "will affect the outcome of the case." *Bankr. Estate of Morris*, 192 P.3d at 523 (citations omitted).

II. Constitutional Challenges and TABOR

Constitutional challenges to Colorado statutes must overcome a "heavy presumption of constitutionality," which is accomplished by establishing that they are unconstitutional "beyond a reasonable doubt." *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) (citing *Colo. Ass'n of Pub. Emps. v. Bd. of Regents of the Univ. of Colo*., 804 P.2d 138, 142 (Colo. 1990)). Although this Court may be bound by this standard, it is an inappropriately high standard of proof for a civil case; the federal "plain showing" standard is proper and should be adopted.[2]

When "construing statutes and citizen initiatives, [courts] attempt to give effect to the General Assembly's and the electorate's intent, respectively." *Campaign Integrity Watchdog v. All. for a Safe & Indep. Woodmen Hills*, 409 P.3d 357, 361 (Colo. 2018). Courts "read words and phrases in context and accord them their plain meanings. If the language is clear, [they] apply it as written." *Id*. (citations omitted). But if "a statute is susceptible of both constitutional

[2] The Colorado Supreme Court recently was faced with whether to abandon the "beyond a reasonable doubt" standard for TABOR challenges and to adopt the "plain showing" standard recognized by the U.S. Supreme Court. *See TABOR Found. v. Reg'l Transp. Dist*., 416 P.3d 101, 104 (Colo. 2018) (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds.")). However, it "decline[d] to reconsider [its] choice of standards" at that time. *Id*.; *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 511 (Colo. 2018) (same).

and unconstitutional interpretations, courts will construe it to avoid constitutional infirmities." *Barber*, 196 P.3d at 254 (citing *Colo. State Bd. of Med. Exam'rs v. Jorgensen*, 599 P.2d 869, 871 (Colo. 1979)).

The Colorado Constitution directs that when courts are interpreting TABOR, the "preferred interpretation [is the one that] reasonably restrain[s] most the growth of government." Colo. Const. art. X, § 20(1). But "this principle . . . applies only where the text . . . supports multiple interpretations equally." *Barber*, 196 P.3d at 247–48. If an interpretation would "hinder basic governmental functions or cripple the government's ability to provide services," *id.* at 248, "reasonableness tempers TABOR's grip." *TABOR Found.*, 416 P.3d at 107. An interpretation is reasonable as "viewed . . . through a lens of practicality and workability." *Id.* (citing *Mesa Cty. Bd. of Cty. Comm'rs v. State*, 203 P.3d 519, 529 (Colo. 2009)).

Nonetheless, courts have a "duty to give effect, whenever possible, to the will of the people as expressed in voter approved constitutional amendments." *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 556 (Colo. 1999). And when a statute violates those amendments, "it is the duty of th[e] court to declare it void." *Leddy v. People*, 147 P. 365, 367 (Colo. 1915); *see also* Randy E. Barnett, *The Judicial Duty to Scrutinize Legislation*, 48 Val. U. L. Rev. 903, 919 (2014) ("In our constitutional system, judges have a duty to scrutinize legislation to ensure that it is within the proper power of the legislature to enact.").

ARGUMENT

I. The hospital provider charge, both before and after SB 17-267, violates TABOR because it is a tax enacted without the requisite vote of the people.

A. The Taxpayer's Bill of Rights

In 1992, voters added TABOR to the Colorado Constitution and "specifically limited the legislative taxing power of the state and local governments by requiring that any new tax must receive voter approval prior to implementation." *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 509 (Colo. 2018). TABOR requires that "districts must have voter approval in advance for . . . any new tax, tax rate increase, . . . extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a). TABOR applies to "districts," which includes state and local governments, but excludes "enterprises." *Id*. § 20(2)(b). If a district enacts a tax without the requisite vote, "[r]evenue collected, kept, or spent illegally . . . shall be refunded with 10% annual simple interest from the initial conduct." *Id.* § 20(1).

B. The Hospital Provider Charge and the Healthcare Charge are taxes levied in violation of TABOR.

The central dispute in this case is whether the Hospital Provider Charge, enacted in 2009, and the Healthcare Charge, enacted in 2017, are taxes or fees. As set forth below, the Hospital Provider Charge was a tax because it was not a fee-for-service transaction and was not levied to defray the cost of services provided; the current Healthcare Charge is a tax for the same reasons.

As the state (*i.e.*, the relevant TABOR district) enacted both charges without the requisite vote, *supra* ¶¶ 6, 20, both charges violate TABOR and a refund is due.[3]

1. The 2009 Hospital Provider Charge was not a fee-for-service transaction.

A fee is a charge levied to cover the cost of "services provided to those who paid the charge." *Barber*, 196 P.3d at 248. The Hospital Provider Charge is not a fee because many who paid the charge did not receive services and many who received services did not pay the charge.

The General Assembly stated the charge was levied "for the purpose of obtaining federal financial participation under the state medical assistance program[.]" 2009 Colo. Sess. Laws 634. The Department combined federal funds and the charge to provide the following services: "a payer source for low-income and uninsured populations . . . [and] reducing the underpayment to Colorado hospitals participating in publicly funded health insurance programs[.]" *Id.*

Those services, in turn, were intended to "reduc[e] the number of persons in Colorado who are without health care benefits; reduc[e] the need of health care providers to shift the cost

[3] Prior to 2009, Colorado did not levy a hospital provider charge to generate supplemental payments under Medicaid. Rather, the Colorado Indigent Care Program and Disproportionate Share Hospital payments distributed federal and state funds to partially cover uncompensated-care expenses for some health care providers. *See* Ex. 12 at 2. Thus, to the extent that the 2009 Hospital Provider Charge is considered a tax, it was levied as a "new tax." *See TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101, 106 (Colo. 2018) (distinguishing between a "new tax" and a change to an existing tax, which would be a "tax policy change" under TABOR). Further, although the Colorado Supreme Court has held that *de minimis* increases in district revenues do not trigger TABOR's requirements, *id.*, there is no dispute that the charges at issue here are not *de minimis*. *See supra* ¶ 7 (for FY 2010–11, the legislature estimated the Hospital Provider Charge would raise $389.5 million; it raised $441 million); *id.* ¶ 13.i (Since 2009, the Hospital Provider Charge and Healthcare Charge have, in aggregate, raised more than $4.5 billion.); Ex. 12 at 25 ("The only two sources of revenue that were larger [than the Hospital Provider Charge] were the general sales tax and the individual income tax.").

of providing uncompensated care to other payers; and expand[] access to high-quality, affordable health care to low-income and uninsured populations." *Id*. As laudable as those policy goals may be, none of them were a service provided to those who paid the charge, *i.e.*, to the hospitals.

Moreover, a review of the annual reports produced by the Department's Hospital Provider Fee Oversight and Advisory Board and now the CHASE Board, which detail the charges collected from FYs 2009–17, shows that several hospitals lost money under the program. *See* Table 1.

Table 1: FYs 2009–17 Hospital Net Loss (Payment Received - Charges Paid)[4]

Loss Every Year	
Good Samaritan Medical Center	$30.4 million
Porter Adventist Hospital	$25.2 million
SkyRidge Medical Center	$59.3 million
Loss in Six of Seven Years	
Littleton Adventist Hospital	$21.9 million
Parker Adventist Hospital	$12.8 million
Never Received a Payment	
OrthoColorado Hospital	$8.9 million

As this table shows, three hospitals lost money every year the program existed and two lost money in six of the seven years they participated. One hospital, OrthoColorado, never received a single dollar in supplemental payments despite paying $8.9 million in charges. For these hospitals, there effectively was no "service" provided, as they were not provided a new payer source for uninsured populations and their underpayments were not reduced. Yet a fee is proper when it is "imposed only on those *using the services* provided[.]" *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1192 (Colo. App. 2005) (emphasis added).

[4] Totals generated from Exhibits 4–11. *See supra* ¶ 11.

Not only were there hospitals that paid the charge but effectively received no service, there also were hospitals that received the services from the program without paying any charges. *See* Table 2 below. The statute authorized the Department to seek a waiver from the federal government to exempt certain hospitals from paying the charge. 2009 Colo. Sess. Laws 635. The Department sought and the federal government provided such a waiver. *Supra* ¶ 9. From FYs 2009–17, fifteen hospitals received more than $13 million in supplemental payments (*i.e.*, the services) even though they did not pay a single dollar in charges.

Table 2: FYs 2009–17 Charge-Exempt Hospitals (Charges Paid and Payment Received)[5]

Hospital Name	Charges Paid	Payments Received
Craig Hospital	$0	$7,008,341
HealthSouth Rehabilitation Hospital - Colorado Springs	$0	$1,718,272
Northern Colorado Rehabilitation Hospital	$0	$1,013,681
Spalding Rehabilitation Hospital	$0	$992,428
Vibra Long-Term Acute Care Hospital	$0	$735,355
HealthSouth Rehabilitation Hospital - Denver	$0	$487,318
Colorado Acute Long-Term Hospital	$0	$484,444
Kindred Hospital - Aurora	$0	$314,529
Kindred Hospital	$0	$219,453
Select Specialty Hospital - Denver	$0	$78,937
Kindred Hospital - Denver South	$0	$63,858
Triumph Hospital	$0	$29,844
Northern Colorado Long-Term Acute Care Hospital	$0	$26,809
Kindred Hospital - Colorado Springs	$0	$12,608
Select Long-Term Care Hospital	$0	$11,395
Total	**$0**	**$13,197,272**

In addition to these charge-exempt hospitals, there was another group of health-service providers that received program services (*i.e.*, payments) but who did not pay the fee: non-

[5] Totals generated from Exhibits 4–11. *See supra* ¶ 12.

hospital providers that were servicing the Medicaid expansion population. Each of the Department and CHASE annual reports covering FYs 2009–17 includes an expenditure labeled "expansion populations." *See* Exs. 4–11. These expenditures total more than $6 billion. *Supra* ¶ 14. These expenditures "went to hospitals and providers who cared for the [Medicaid] expansion populations[.]" Ex. 19 (Burnett Dep. 82:7–8). Defendants' own expert explains that hospitals accounted for only thirty-one percent of these expenditures. Ex. 17 at 15 (citing Ex. 18 at 8). In other words, roughly sixty-nine percent of the more than $6 billion spent on "expansion populations" from the Hospital Provider Charge cash fund were made to health-service providers who never paid the Hospital Provider Charge.

For these groups of health-service providers, the Hospital Provider Charge did not operate as a fee-for-service transaction and cannot by any legerdemain be considered as such. Some paid the charge without receiving a service while others received the service without paying a charge. Focusing on the substance of the relationship clarifies that the hospitals and other health-service providers participated in a government program where the charges paid and the services rendered were disconnected from one another. There is a term for the funding mechanism used for such a program: it's called a tax.[6]

2. The 2009 Hospital Provider Charge was not reasonably related to the cost of providing the services rendered.

Notwithstanding the incongruities noted above, if the Court finds that hospitals were participating in a fee-for-service transaction, the Hospital Provider Charge still cannot be

[6] This conclusion is confirmed by CMS, which determined that the Hospital Provider Charge constituted a "health care-related tax" for purposes of 42 C.F.R. § 433.68(a)–(b), that the "net impact of the tax is generally redistributive[,]" and that "the amount of the tax is not directly correlated to Medicaid payments." *Supra* ¶ 10.

considered a fee under Colorado law because the charges collected were not reasonably related to the cost of providing the services rendered.

The Colorado Supreme Court has directed that, in determining whether a charge is a tax or a fee, the primary consideration is whether the legislature was relying on its taxation or regulatory power. *City of Aspen*, 418 P.3d at 513. An entity may not levy a fee under the guise of using regulatory power if that entity does not have regulatory police power. *See Bd. of Cty. Comm'rs of the Cty. of Mesa v. Grand Valley Drainage Dist.*, No. 16-30317, slip op. at 38–39 (Colo. D. Ct. June 5, 2018) (finding a charge was not a fee, in part, because Defendant did not have "broad regulatory police power").

A key factor in making that determination is examining "the government's stated purpose and the label that the government gives the charge." *City of Aspen*, 418 P.3d at 514. But because the government may "attempt[] to circumvent TABOR's requirements by pretending that a tax is, in fact, not a tax, . . . [a court must] focus [its] core inquiry on the practical realities of the charge's operation" by "consider[ing] whether there is a *reasonable relationship* between the direct or indirect cost to the government of providing the product or activity assessed and the amount being charged." *Id*. (emphasis added).[7] A reasonable relationship between the fee charged and the service provided is one where the amount raised by the fee corresponds to the amount needed to defray the government's costs in providing or administering the service. *Id*. (collecting cases where fees "defrayed" government costs).

[7] If a charge is properly established as a fee, the fact that "the fees were eventually transferred to the General Fund does not alter their essential character as fees[.]" *Barber*, 196 P.3d at 250.

Courts consider both direct and indirect costs incurred by the entity collecting the charge and providing the service. In *Bloom*, the Colorado Supreme Court found a charge was a fee because it was used to defray the direct costs of "maintenance of city streets[.]" *Bloom v. City of Fort Collins*, 784 P.2d 304, 311 (Colo. 1989); *see also W. Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 158 (Colo. 1961) (finding fee reasonable because it covered direct "expense of connection to . . . water trunk lines"). Indirect costs include such expenses as those "incurred in . . . governmental planning." *Anema v. Transit Const. Auth*., 788 P.2d 1261, 1267 (Colo. 1990). But all costs, whether direct or indirect, are relevant only if they are incurred by the entity collecting the charge and administering the service. Although "[m]athematical exactitude is not required," fees are used "to offset . . . costs *of operating that department*." *Bainbridge, Inc. v. Bd. of Cty. Comm'rs of Cty. of Douglas*, 53 P.3d 646, 651 (Colo. App. 2001); *see also City of Aspen*, 418 P.3d at 513 (fee to cover "cost *to the city*") (citing *Bloom*, 784 P.2d at 305–07); *id*. at 514 (fee "to reduce the cost *to the city*") (emphasis added throughout).

When it implemented the Hospital Provider Charge in 2009, the General Assembly provided that its purpose was, among other things, to "pay the administrative costs to the state department in implementing and administering" the charge. 2009 Colo. Sess. Laws 634. The charge also was levied "for the purpose of obtaining federal financial participation under the state medical assistance program." *Id.* In the instant case, therefore, the Court must determine what costs the Department incurred to levy and collect the Hospital Provider Charge, draw down federal matching funds, and provide supplemental payments to the hospitals.

The Department's annual reports show that from FYs 2009–17 it incurred $211 million in administrative costs but collected more than $4.5 billion in charges.[8] *See* Table 3 below. This ratio of more than **21:1** is not a reasonable relationship because it is not necessary to collect $4.5 billion in charges to defray $211 million in costs. *See City of Aspen*, 418 P.3d at 513 (reasonable fees are used "to defray the . . . costs of providing a service"); C.R.S. § 25.5-4-402.4(2)(f) (provider charge enacted "to defray the costs of providing the business services specified").

Table 3: FYs 2009–17 Dep't Administrative Costs & Charges Collected[9]

Fiscal Year	Administrative Costs	Charges Collected
2009-10	$2,939,000	$300,000,000
2010-11	$5,744,000	$441,000,000
2011-12	$15,825,000	$585,700,000
2012-13	$17,626,000	$651,700,000
2013-14	$25,364,000	$566,000,000
2014-15	$38,289,000	$529,000,000
2015-16	$46,375,000	$804,000,000
2016-17	$59,520,000	$654,000,000
Total	**$211,682,000**	**$4,531,400,000**

In addition to administrative costs, the Department's annual reports show three additional expenditures from the hospital provider charge cash fund: supplemental hospital payments, expansion populations, and offsets for revenue loss. *See, e.g.*, Ex. 8 at 16. But none of these additional items are costs the Department incurred to provide its service, *i.e.*, levying the charge, accessing federal funding, and making supplemental payments.

[8] CHASE reported the Department's FY 2016–17 administrative costs for the Hospital Provider Charge—a purportedly unrelated program—which is further evidence that the Healthcare Charge is the continuation of an existing revenue stream subject to TABOR. *See infra* § III.A.

[9] Totals generated from Exhibits 4–11. *See supra* ¶ 13.

A "cost" is defined as the "amount paid or charged for something[.]" Black's Law Dictionary (10th ed. 2014). Comparatively, an "expenditure" is an accounting concept defined as the "act or process of spending or using money . . . ; especially, the disbursement of funds." *Id*. None of the three additional expenditures are "costs" to the Department because the Department did not pay any money or incur any liability to receive the resources that it used for those disbursements; *i.e*., it did not "cost" the Department anything, beyond the administrative costs outlined above, to make these "expenditures."

The first item, supplemental hospital payments, relate to funds that the Department obtained from state general fund appropriations and federal matching funds that it then disbursed to hospitals. *See* Ex. 12 at 6, 11–13. The disbursement of such funds was not a "cost" of providing any service because the Department did not spend money to obtain those funds; the Department simply acted as a passthrough or conduit. To the extent the Department incurred costs in disbursing those funds, they are accounted for in the administrative costs.

The second item, expansion populations, also is not a cost because the federal government provided those funds to the Department for distribution to the hospitals and other health-service providers at a 100- or 95-percent matching rate. *See* 42 U.S.C. § 1396d(y)(1) (establishing annual matching rates); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 542 (2012) (explaining program). As with the supplemental-hospital-payments category, the Department acted as a conduit and did not spend money to obtain those federal funds, and any costs associated with their disbursement would be accounted for in the administrative costs line-item. Even if the Department did spend a small 5-percent portion to obtain the 95-percent matching rate in 2017, 42 U.S.C. § 1396d(y)(1)(B), that program was separate from the Hospital

Provider Charge and was not a cost to the Department to provide the service funded by the charge. Colorado, in other words, could have expanded Medicaid to cover expansion populations and gained access to those funds without levying the Hospital Provider Charge. The expansion-population expenditure thus cannot be part of the reasonably-related calculation.

The final item, the "offset revenue loss" expenditure, resulted from an authorization that allowed the Department to transfer money from the hospital provider charge cash fund to the Department's general fund to make up for the loss of access to federal matching funds for certified public expenditures. *See* 2009 Colo. Sess. Laws 639; Ex. 14 (Dolson Dep. 24:22–26:11) (describing fund transfer).[10] That expenditure also is not a cost of providing services for at least two reasons. First, because the money was transferred from the hospital provider charge cash fund to the Department's general fund, it was a revenue source for the Department, not a cost. Second, even if the certified public expenditures the Department made to public hospitals could be considered a cost that led to the "offset revenue loss" funds, that is not a *relevant* cost because the Department did not incur that cost to render the service the Hospital Provider Charge was meant to defray (*i.e.*, supplemental payments to hospitals that paid the charge).

These three items are contrasted with actual administrative costs, such as staff salaries and information-technology contracts. *See* Ex. 8. at 16–17. In the latter, the Department paid money to obtain employees' time and contracted services, which it in turn used to provide services to the hospitals. These administrative costs are the only relevant costs when considering

[10] The "offset revenue loss" provision cited has since been repealed and recodified elsewhere. *See* C.R.S. § 25.5-4-402.3 (noting repeal); *id.* § 25.5-4-402.4(5)(b)(VII) (allowing use of funds to "offset the loss of any federal matching money due to a decrease in the certification of the public expenditure process").

whether the Hospital Provider Charge was reasonably related to the services rendered. *City of Aspen*, 418 P.3d at 515 (concluding charge was a fee because it was used "to defray the reasonable direct and indirect costs *of administering*" the program); *Barber*, 196 P.3d at 249 (charge was a fee because "the governing statute expressly tie[d] these monies *to the administration* of the motor vehicle registration laws") (quoting *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999)) (emphasis added in both).

To summarize, from FYs 2009–17, the Department incurred $211 million in direct and indirect costs to administer the program funded by the Hospital Provider Charge but collected more than $4.5 billion in revenue. Those amounts are not reasonably related, and the Department accordingly was not collecting a charge designed to defray its costs. The charge was a tax, not a fee.

3. The 2017 Healthcare Charge—administered by CHASE—is not a fee-for-service transaction and is not reasonably related to the cost of providing the services rendered.

For all the same reasons noted above regarding the Hospital Provider Charge, the 2017 Healthcare Charge is not a fee-for-service transaction. SB 17-267 did not meaningfully change any aspect of how the charge is levied. *See infra* § III.A. The same statutorily-exempt hospitals and non-hospital providers will not pay the charge but both will continue to receive services. And the same types of hospitals are likely to be net losers year after year. Thus, the new Healthcare Charge is not a fee-for-service transaction.

The Healthcare Charge also is not reasonably related to the costs of providing the services rendered. When the General Assembly created CHASE to administer the Healthcare Charge it stated that the charge was "imposed for the specific purposes of allowing the enterprise

to defray the costs of providing the business services specified[.]" C.R.S. § 25.5-4-402.4(2)(f) (emphasis added). Those services include "[o]btain[ing] federal matching money and return[ing] both the [Healthcare Charge] and the federal matching money to hospitals," *id.* § 25.5-4-402.4(2)(d)(I), and consulting services designed to improve efficiencies and advise hospitals on updates to federal and state laws. *Id.* § 25.5-4-402.4(4)(a).

As it was perhaps aware of the requirement that charges and the cost of services must be reasonably related, the General Assembly required that the Hospital Provider Charge be "collected at rates that are reasonably calculated based on *the benefits received* by" hospitals. *Id.* § 25.5-4-402.4(2)(f) (emphasis added). But, on the tax-versus-fee question, it is irrelevant whether the charge is reasonable in relation *to the benefits received*.[11] Rather, the Colorado Supreme Court has held that a charge must be reasonable in relation *to the costs incurred* to provide or administer the service. *See City of Aspen*, 418 P.3d at 513 (collecting cases).

Although CHASE's administrative costs for FY 2017–18 are not yet available,[12] there can be little doubt that the ratio between the amount levied and the cost of services provided will be similar to the Department's ratio under the previous Hospital Provider Charge. Like the Department, CHASE was granted the power to levy a charge to draw down matching federal funds. On this point, the Department and CHASE are identical. CHASE also is authorized to provide various consulting services to the payor hospitals, but it is unclear what costs, if any,

[11] Defendants' expert makes the same mistake when he calculates the benefits received from the program rather than calculating the actual amounts needed to defray the costs of providing the services provided by the Department and CHASE. *See* Ex. 17 at 21–23 (Tables 8 and 9 calculating hospital revenue gained from expansion populations and supplemental payments).

[12] *Supra* ¶ 21 ("Administrative expenditures for [FY] 2017–18 for the CHASE will be available and reported in the next annual report on January 15, 2019.").

CHASE will incur to provide those additional consulting services because the entity is new and has not yet fully implemented all the services. *See* Ex. 14 (Dolson Dep. 42:3–43:22) (remarking that CHASE has not "embarked on that yet [because] CHASE is fairly new," but it has "begun that work"). Nevertheless, the "business services of CHASE are part of the administrative costs of CHASE." *Id*. 45:8–9. And because, by statute, CHASE's "administrative costs . . . are limited to three percent of [its] expenditures," C.R.S. § 25.5-4-402.4(4)(a)(III), the marginal additional cost to provide consulting services to hospitals will not meaningfully change the ratio between the charge collected and the costs to be defrayed.

Therefore, just like the Hospital Provider Charge that was levied by the Department, the Healthcare Charge levied by CHASE is not a fee-for-service transaction and is not reasonably related to defraying the costs of services. As such, it is a tax levied in violation of TABOR.

C. CHASE is an unlawful enterprise because it levies a tax and does not operate a business.

The General Assembly tried to create CHASE "as a government-owned business[.]" C.R.S. § 25.5-4-402.4(3)(a). But because it gave CHASE the power to tax by levying the Healthcare Charge, as explained above, it is an unlawful enterprise.

To qualify as a TABOR-exempt enterprise, an entity must first be a government-owned business. *See* Colo. Const. art. X, § 20(2)(d) (defining an "enterprise" as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined").[13] The term "business"

[13] The Court "must determine whether the entity is both 'government-owned' and a 'business' under the ordinary meaning . . . of these terms." *TABOR Found. v. Colo. Bridge Enter*., 353 P.3d 896, 904 (Colo. Ct. App. 2014) (citing *Nicholl*, 896 P.2d at 867–68). Plaintiffs do not dispute that CHASE is government-owned.

means "an activity which is conducted in the pursuit of benefit, gain or livelihood." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 868 (Colo. 1995) (citing *Lindner Packing & Provision Co. v. Indus. Comm'n*, 60 P.2d 924, 926 (1936)). But "the power to unilaterally impose taxes, with no direct relation to services provided, is inconsistent with the characteristics of a business as the term is commonly used. Nor is it consistent with the definition of 'enterprise[.]'" *Id.* at 869. Here, as set forth above, the Healthcare Charge that CHASE administers is a tax because it is not a fee-for-service and is not reasonably related to the cost of the services that CHASE provides. Because CHASE is imposing a tax, it is an unlawful enterprise. *Id.*

* * * *

As the material facts underlying Plaintiffs' TABOR "new tax" challenge to the Hospital Provider Charge and Healthcare Charge are undisputed, and both charges are taxes rather than fees, Plaintiff is entitled to judgment as a matter of law.

II. SB 17-267 violates the single-subject requirement because it contains disconnected provisions that do not relate directly to the sustainability of rural Colorado.

The Colorado Constitution and attendant case law impose a single-subject requirement on most new bills, which means that (1) a bill must contain one unifying subject, (2) there must be a purposive element or modification of the bill's subject; and (3) all substantive provisions in the bill must be dependent on and connected to that purpose or modification. Although the General Assembly proclaimed that the purpose of SB 17-267 was to improve the sustainability of rural Colorado, the bill contains wide-ranging provisions that are not directed to that purpose. Those disconnected provisions include, among other things: new debt for statewide transportation spending, business tax credits, state budget cuts, an increase in Medicaid copays, the creation of CHASE, and transfer of the administration of the Healthcare Charge. SB 17-267 does not meet

the single-subject requirement because, although its purported purpose relates to a single subject, its provisions are not dependent on and connected to that purpose. The General Assembly's claim otherwise is a transparent ruse. The Colorado Constitution directs that all such provisions are void. Here, that includes CHASE and the Healthcare Charge.

A. The single-subject requirement

The Colorado Constitution requires that "[n]o bill, except general appropriation bills, shall be passed containing more than one subject[,]" which "shall be clearly expressed in its title[.]" Colo. Const. art. V, § 21. If a bill includes a subject that is beyond the single subject in the title, that portion "shall be void only as to so much thereof as shall not be so expressed." *Id*.

The Colorado Supreme Court has long recognized the provision's dual purpose. First, it is designed to prevent "log rolling," that is, "putting together in one bill subjects having no necessary . . . connection, for the purpose of enlisting in support of such bill the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits[.]" *Catron v. Bd. of Comm'rs of Archuleta Cty.*, 33 P. 513, 514 (Colo. 1893). Second, it aims to provide notice about legislative activities "to prevent surprise and fraud from being practiced upon legislators, and to apprise the people of the subjects of legislation[.]" *Id.* at 514.

To satisfy this provision, a bill must have one unifying subject and a purposive element or modification of that subject. In addition, all substantive provisions in the bill must be dependent on and connected to that purpose or modification. Or, as the Colorado Supreme Court has stated in the negative construction, "to constitute more than one subject . . . the text of the measure must relate to more than one subject and it must have at least two distinct and separate

purposes which are not dependent upon or connected with each other." *In re Proposed "Public Rights in Waters II,"* 898 P.2d 1076, 1078–79 (Colo. 1995).

A bill may use a "comprehensive framework" of substantive provisions to address a single subject, but only if "all of its provisions relate directly to its single subject." *In re No. 91*, 235 P.3d, 1071 1076 (Colo. 2010). Further, a "proponent's attempt to characterize his initiative [or bill] under some overarching theme will not save an initiative [or bill] containing separate and unconnected purposes." *In re No. 43*, 46 P.3d 438, 442 (Colo. 2002); *see also In re No. 89*, 328 P.3d 172, 177 (Colo. 2014) (noting the standard is not met "simply by claiming that each proposed change falls under the same general overarching theme").

The outcomes of two cases challenging initiatives related to water illustrate the boundary between a valid and invalid single subject.[14] In *In re Proposed "Public Rights in Waters II,"* the Colorado Supreme Court held that an initiative's provisions related to both water district elections and public trust water rights lacked the necessary connection. 898 P.2d at 1080. It noted that the existence of "'water' [in both provisions] is too general and too broad to constitute a single subject[.]" *Id.* But a later initiative that focused on "the public's rights in the waters of natural streams" did not violate the single-subject requirement. *In re No. 3*, 274 P.3d 562, 566 (Colo. 2012). This was so, the court held, because the initiative's "proposed subsections all relate to the 'Colorado public trust doctrine' and that doctrine's impact on the 'public's rights in waters of natural streams.'" *Id*. at 567 (citations omitted); *cf. In re No. 45*, 274 P.3d 576, 580

[14] The Colorado Constitution also requires that "every constitutional amendment or law proposed by initiative . . . be limited to a single subject." Colo. Const. art. V, § 1(5.5). Courts "evaluate the single-subject/clear title mandate in initiatives in the same way that [they] evaluate single subjects and clear titles in bills[.]" *In re No. 25*, 974 P.2d 458, 463 (Colo. 1999).

(Colo. 2012) (holding "public control of waters" was a single subject because it "eliminat[ed] the 'unappropriated' and 'natural stream' limitations of the existing legal framework, and replac[ed] them with a comprehensive 'dominant water estate' controlled by the public").

Reviewing these cases under the three-prong test provides clarity. "Water" is only a subject and the first initiative was invalid because it lacked a purposive or modification connection between "water" and its substantive provisions. *See also In re No. 17*, 172 P.3d 871, 875–76 (Colo. 2007) (initiative on "environmental conservation" was not a single subject because its "purpose of efficiency . . . is conjoined with the creation of a public trust standard."); *In re House Bill No. 1353*, 738 P.2d 371, 373 (Colo. 1987) ("monetary impact" not a single subject in a bill with "various sections relate[d] to numerous and diverse subjects"). But securing "the public's rights in the waters of natural streams" contains both a subject (*i.e.*, "waters of natural streams") and a purposive modification of that subject (*i.e.*, securing "the public's rights in" those waters). And all the initiative's provisions "related directly" to that purpose. *In re No. 91*, 235 P.3d at 1076.

B. SB 17-267 does not meet the single-subject requirement because its provisions are not directly related to the purpose that it announces.

The General Assembly stated it enacted SB 17-267 "to ensure and perpetuate the sustainability of rural Colorado by addressing" demographic, economic, and geographical issues. Ex. 1 § 1(1)(b).[15] It also included a catch-all finding that "the sustainability of rural Colorado is directly connected to the economic vitality of the state as a whole[.]" *Id.* § 1(2). It claimed that "provisions that on their face apply to and affect all areas of the state but that especially benefit

[15] Plaintiffs are providing the Court with SB 17-267 as an exhibit so that they can provide precise citations to the bill's sections. The bill is also available at 2017 Colo. Sess. Laws 1437–78.

rural Colorado, relate to and serve and are necessarily and properly connected to the general assembly's purpose of ensuring and perpetuating the sustainability of rural Colorado." *Id.*

In its substantive provisions, SB 17-267: (1) alters an income tax credit for business personal property taxes, *id.* §§ 25–26; (2) raises the marijuana sales tax rate, *id.* §§ 29–30; (3) doubles Medicaid copays at pharmacies, *id.* § 14; (4) authorizes up to $2 billion in lease-purchase agreements for construction and transportation projects, *id.* § 12; (5) directs most state departments to submit budgets with a two-percent reduction, *id.* § 9; (6) creates CHASE and transfers administration of the Healthcare Charge, *id.* §§ 16–17; (7) lowers the excess state revenues cap by $200 million, *id.* § 11; and (8) authorizes participation in a federal program to care for children with complex medical conditions. *Id.* §§ 21–22. None of these provisions are limited to or exempt rural Colorado; instead, they all affect the whole state.

SB 17-267 does contain two provisions that "relate directly" to rural Colorado but they are not severable from the other provisions. First, it provides a one-time $30 million allocation of marijuana-sales-tax revenue to rural schools in FY 2017–18. *Id.* § 4. After which, it does not direct marijuana-sales-tax revenue to rural Colorado. Second, SB 17-267 directs less than twenty-five percent of the capital raised from the authorized lease-purchase agreements to improve and maintain roads in rural Colorado. *Id.* § 31. In addition, the bill allows CHASE to consider whether to exempt a hospital from paying the Healthcare Charge if it is "located in a rural area." C.R.S. § 25.5-4-402.4(4)(c)(II)(A).

Applying the three-prong test for the single-subject requirement to SB 17-267 is straightforward. First, its one unifying subject is "rural Colorado." Second, its purpose or modification of that subject is "to ensure and perpetuate [its] sustainability[.]" Although the

subject and purpose are broad, they appear to meet the test. *See In re No. 256*, 12 P.3d 246, 254 (Colo. 2000) (holding a subject is not invalid simply because it is broad). But on the third prong, SB 17-267 contains multiple incongruous provisions that do not "relate directly" to its purpose.

Six of the eight substantive provisions in SB 17-267 apply entirely to the whole state, almost half of the population of which now lives in urban areas.[16] There is no limitation on the application of any of these six provisions for rural Colorado. Nor is there any finding about why, for example, doubling Medicaid copays at pharmacies across the entire state improves the sustainability of rural Colorado. Thus, the bill violates the single-subject requirement because its "various sections relate to numerous and diverse subjects that have significance that transcend[s] the common characteristic of" the sustainability of rural Colorado. *In re House Bill No. 1353*, 738 P.2d at 373; *id*. (noting that the "mere recitation of the[] provisions [can be] sufficient to demonstrate that [a bill] embraces such a diversity of subjects as to compel the conclusion that [it] violates the single subject requirement").

As noted, only two of the eight provisions in the bill even mention rural Colorado and they only allocate a portion of the revenue raised to rural Colorado. Those provisions are not severable from the rest of the bill because they are "so essentially and inseparably connected with, and so dependent upon, the void provision[s] that it cannot be presumed the legislature would have enacted the valid provisions without the void one[s][.]" C.R.S. § 2-4-204.[17]

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[16] *See generally* Kevin Simpson, *Colorado Divide: Seismic shifts create rural-urban chasm in the culture, economy and politics of the state*, Denver Post, July 21, 2017 (citing U.S. Census, Colorado Dep't of Local Affairs), https://dpo.st/2uuxImm.

[17] SB 17-267 does not contain a severability clause. But Colorado's "general severability clause applies to a legislative act which does not contain a specific severability provision." *Hejira Corp. v. MacFarlane*, 660 F.2d 1356, 1362 (10th Cir. 1981).

Generally, there is a presumption in favor of severability, *People v. Dist. Court*, 834 P.2d 181, 190 (Colo. 1992) (citation omitted), and courts prefer "only partial, not complete, invalidation." *Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010). But that presumption "is dispelled if what remains is so incomplete or riddled with omissions that it cannot be salvaged as a meaningful legislative enactment." *Id*. at 639 (quotation cleaned up).

Here, the mechanisms the General Assembly used to raise the revenue to fund the two unoffending provisions is not limited to or related directly to rural Colorado. For example, it would be improper for the Court to invalidate the authorization for more than seventy-five percent of the capital raised from the lease-purchase agreement and leave the state with the authority to fund rural road construction and maintenance with the remaining less than twenty-five percent. This is precisely the type of "log rolling" that the single-subject requirement is designed to prevent. There is no way to know whether the legislature would have passed a bill authorizing the use of less than twenty-five percent of the lease-purchase-agreement revenue for rural Colorado without raising the other seventy-five percent. Therefore, as with the marijuana tax rate increase and the remainder of the provisions in the bill, it is void in its entirety.

Perhaps in an attempt to save these incongruous provisions, the General Assembly included a catch-all declaration that anything that helps rural Colorado also helps the whole state, and anything that helps the whole state also helps rural Colorado. Ex. 1 § 1(2). But this is precisely the type of broad characterization that "will not save an initiative [or bill] containing separate and unconnected purposes." *In re No. 43*, 46 P.3d at 442; *In re No. 89*, 328 at 177 (same).

Therefore, as the material facts underlying Plaintiffs' single-subject challenge to SB 17-267 are undisputed, and the bill contains multiple substantive provisions that are not directly related to the sustainability of rural Colorado and that are not severable from the bill, Plaintiff is entitled to judgment as a matter of law that the entirety of SB 17-267 is void.

III. SB 17-267 violates the excess state revenues cap because it failed to make a corresponding downward adjustment in the cap when it created CHASE.

TABOR imposes a limit on the revenues that the state may keep and spend. Colo. Const. art. X, § 20(7). In 2005, the voters allowed the state to keep and spend revenues that exceed TABOR's revenue limit, but fall below an annually adjusted "excess state revenues cap." C.R.S. § 24-77-103.6(1)(b). Revenues that exceed the cap must be refunded unless the state secures voter approval to keep and spend them. Colo. Const. art. X, § 20(7)(d). These limits apply to state and local governments (*i.e.*, TABOR "districts") but not to enterprises. *Id.* § 20(2)(b). If, however, there is a "[q]ualification or disqualification [of] an enterprise [it] shall change district bases and future year limits." *Id.* § 20(7)(d). Thus, if a district's authority to levy a revenue stream subject to TABOR is transferred to an enterprise, there must be a corresponding reduction in the excess state revenues cap limits to account for the change.

Here, there is no dispute that before the enactment of SB 17-267, the revenue raised by the Hospital Provider Charge was subject to TABOR limits. *See supra* ¶ 22. The only question is whether the state was required to lower the "excess state revenues cap" by the full amount of the revenue raised by the charge when it transitioned administration of that charge from the Department to CHASE. The answer to that question is yes, it must.

A. SB 17-267 converted the existing Hospital Provider Charge into the Healthcare Charge.

The Healthcare Charge is a continuation of the Hospital Provider Charge. This is so for two reasons: (1) the charges and programs they fund are the same and (2) the transfer from the Department to CHASE was done via a type 2 transfer as a continuation of an existing program.

1. The two charges and the programs they fund are the same.

Examining five key provisions of the programs funded by the 2009 Hospital Provider Charge and the 2017 Healthcare Charge reveals that they are the same in all relevant respects.

First, both charges were enacted with identical legislative findings, declaring that "the state and the providers of publicly funded medical services . . . share a common commitment to comprehensive health care reform." *Compare* 2009 Colo. Sess. Laws 633–34, *with* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(2). Both bills also find that "hospitals within the state incur significant costs by providing uncompensated emergency department care and other uncompensated medical services[.]" *Id.*

Second, the programs funded by both charges have the same objectives: providing additional revenue for providers serving low-income and uninsured populations, reducing underpayments to hospitals, reducing the number of persons without health benefits, reducing the need for hospitals to shift the costs of uncompensated care, and expanding access to health care. *Compare* 2009 Colo. Sess. Laws 633–34, *with* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(2)(c). SB 17-267 has only one additional objective: to provide certain consulting services to hospitals. Ex. 1 § 17; C.R.S. § 25.5-4-402.4(4)(a)(IV).

Third, both bills use the same funding method to accomplish their objectives: levying a charge on hospitals to artificially inflate the cost of care to increase federal matching funds.

Compare 2009 Colo. Sess. Laws 634 (The state "is authorized to charge and collect hospital provider fees . . . [to] obtain[] federal financial participation under the state medical assistance program[.]"), *with* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(4)(a) (same, applied to CHASE).

Fourth, both charges are contingent upon approval from the federal government and receipt of federal funds. *Compare* 2009 Colo. Sess. Laws 641 (If federal "authorization is withdrawn or changed so that federal matching funds are no longer available, the [Department] shall cease collecting the provider fee[.]"), *with* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(6)(c) (same, applied to CHASE). The size of both charges also is limited to the matching funds received from the federal government. *Compare* 2009 Colo. Sess. Laws 636–37 (requiring refund to hospitals of "any portion of the provider fee . . . for which the state department has not received federal matching funds"), *with* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(4)(e)(II) (same, applied to CHASE).

Fifth, both bills authorize the Department or CHASE to seek a waiver from the federal government's broad-base provider requirement contained in 42 C.F.R. § 433.68(e), and both exempt the same types of hospitals from the charge. *Compare* 2009 Colo. Sess. Laws 635 (The state "may seek a waiver from the broad-based provider fees requirement . . . [and] may exempt from payment: . . . psychiatric hospitals, . . . general hospitals and certified long-term care hospitals, . . . critical access hospitals, . . . inpatient rehabilitation facilities, or hospitals specified for exemption[.]"), *with* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(4)(c) (same, applied to CHASE).

In sum, both charges do the same thing, by the same method, with the same exemptions, and subject to the same limitations. They are, in all meaningful respects, identical.

2. The General Assembly used a type 2 transfer to convert the administration of an existing program to CHASE.

SB 17-267 transfers the authority to levy the charge and operate the program from the Department to CHASE via a type 2 transfer; it did not abolish the existing program and then create a new program out of whole cloth.

SB 17-267 states that CHASE "shall exercise its powers and perform its duties as if the same were transferred to the state department by a type 2 transfer[.]" Ex. 1. § 17; C.R.S. § 25.5-4-402.4(3)(e). A type 2 transfer means "the transferring of all or part of an existing department, institution, or other agency to a principal department[.]" C.R.S. § 24-1-105(2). When this type of transfer occurs, all or part of a department's "statutory authority, powers, duties, and functions, records, personnel, property, and unexpended balances . . . , including the functions of budgeting, purchasing, and planning, are transferred to the" new entity. *Id*. This contrasts with a type 3 transfer, which involves the "abolishing of an existing department, institution or other agency[.]" *Id*. § 24-1-105(3).

As the Attorney General has opined, the fact that an entity is "created by a type 2 transfer is significant." Colo. Att'y Gen., Opinion No. 06-05, 2006 WL 2356148, at *1 (July 24, 2006). It means that there remains "a degree of direct control" between the old and new entities. *Id*. at *2. Under this scheme, "the Department's executive director is the party ultimately responsible for the exercise of [CHASE's] statutory powers." *Id*. at *3 (citation omitted).

Here, the General Assembly claimed that the "repeal of the hospital provider fee program, as it existed [before SB 17-267] . . . and the creation of [CHASE] as a new enterprise to charge and collect a new [Healthcare Charge] . . . is the creation of a new government-owned business that . . . does not constitute the qualification of an existing government-owned business

as an enterprise for purposes of" TABOR and the excess state revenues cap. Ex. 1 § 17; C.R.S. § 25.5-4-402.4(3)(c)(I).

However, the type of statutory transfer used and the way that transfer occurred reveals that the General Assembly did indeed "qualify" a new enterprise and convert the authority to levy an existing revenue stream subject to TABOR from the Department to CHASE. For example, the Hospital Provider Charge was overseen by an oversight and advisory board, *see* 2009 Colo. Sess. Laws 641, and the Healthcare Charge is now overseen by the CHASE Board. *See* Ex. 1 § 17; C.R.S. § 25.5-4-402.4(7). But the latter board was simply populated with the members from the former. *Id.* § 25.5-4-402.4(7)(a)(II) ("The initial members of the [CHASE] board are the members of the hospital provider fee oversight and advisory board[.]"). Between the June 27, 2017 Hospital Provider Fee Oversight and Advisory Board meeting, the last meeting prior to the creation of CHASE, and the August 22, 2017 CHASE Board meeting, the first following its creation, none of the thirteen board members changed. *Supra* ¶ 23. They did not even need to be reappointed. *Id*.

After its creation, the CHASE Board reported the Department's FY 2016–17 revenue and administrative costs for the Hospital Provider Charge—a purportedly unrelated program—which is further evidence that the Healthcare Charge is the continuation of an existing revenue stream subject to TABOR. *See* Ex. 11 at A14.

In addition, the General Assembly's contention that it was not qualifying "an existing government-owned business as an enterprise" is a category error. No one has or is contending that the Hospital Provider Charge program was a "government-owned business." Instead, it was a program administered by the Department, a state government agency with a budget subject to

TABOR. The General Assembly's Office of Legislative Legal Services makes this clear, explaining that the Department "is not a government-owned business but is instead a principal department of the executive branch of state government charged with a purely governmental mission[.]" Ex. 20 at 3.

Although this Court may consider labels the General Assembly places on legislative provisions, it has an independent duty to examine the substance behind those labels. *See Mosko v. Dunbar*, 309 P.2d 581, 594 (Colo. 1957) (confirming a refusal to review for "constitutional validity [would be] . . . surrendering the jurisdiction of the courts to legislative findings"); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). *Ipse dixit* will not do. The General Assembly's claim ignores the fact that it converted the authority to collect the same revenue from the Department to CHASE. Because SB 17-267 transferred the administration of an existing revenue stream subject to TABOR to a newly qualified enterprise, the legislature was required to "change district bases and future year limits." Colo. Const. art. X, § 20(7)(d). It failed to do so.

B. SB 17-267 did not make a full reduction in the excess state revenues cap.

As the final fiscal note accompanying SB 17-267 conceded, when an "existing state government entity becomes an enterprise, its revenue is exempted from the state TABOR limit, and a corresponding downward adjustment is made to the level at which the TABOR limit is set." Ex. 2 at 5. Prior to SB 17-267, the Hospital Provider Charge raised $656.6 million in FY 2016–17. *Supra* ¶ 18. That amount was subject to TABOR. *Id.* ¶ 20. The Hospital Provider Charge was projected to raise $600.6 million in FY 2017–18, *id.* ¶ 17, which would have been subject to TABOR if the General Assembly had taken no action. Therefore, when it "qualified"

CHASE as an enterprise and transferred administration of the Hospital Provider Charge (now, the Healthcare Charge) to CHASE, the state was required to make a "corresponding downward adjustment" to the TABOR limits in the amount of revenue the charge was projected to raise in the next fiscal year: $600.6 million. SB 17-267 did not make that adjustment.

Instead, the bill lowered the cap by only $200 million. Ex. 1 § 11; C.R.S. § 24-77-103.6(3)(c)(II). In doing so, the General Assembly admitted that, because of the transfer of the program to CHASE, "the state [will be able] to spend more general fund money for general governmental purposes than it would otherwise be able to spend below the excess state revenues cap[.]" *Id*. The General Assembly found that "it [was] appropriate to restrain the growth of government by lowering the base amount used to calculate the excess state revenues cap for the 2017-18 state fiscal year by two hundred million dollars." *Id*.

By admitting that a downward adjustment was warranted, the General Assembly revealed its awareness that it was not simply terminating one program and creating something wholly new. But it failed to lower the cap by the requisite amount, resulting in a state excess revenue cap that was $400.6 million higher than TABOR demands.

To summarize, to the extent that the Court finds that CHASE is a valid TABOR-exempt enterprise it must also find that SB 17-267 "qualified" a new enterprise within the meaning of TABOR when it converted an existing revenue stream subject to TABOR into a revenue stream administered by that TABOR-exempt enterprise. The General Assembly was thus required to make a corresponding downward adjustment to the TABOR cap in the amount of the revenue that was projected to be raised in the next fiscal year. It failed to do so.

As the material facts underlying Plaintiffs' "excess state revenues cap" challenge to SB 17-267 are undisputed and because no vote has been held that would allow the state to retain this excess revenue, Plaintiffs are entitled as a matter of law to declaratory and injunctive relief preventing the state from retaining these funds and an order directing the excess funds be refunded to the people, with ten percent simple interest calculated from the date of the initial unconstitutional conduct. Colo. Const. art. X, § 20(1).

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment as a matter of law. Plaintiffs respectfully request that the Court: declare the 2009 Hospital Provider Charge was levied in violation of TABOR in FYs 2010–17; declare the 2017 Healthcare Charge was levied in violation of TABOR in FY 2017–18 and in each subsequent fiscal year until the Court's order; enjoin Defendants from levying the Healthcare Charge unless and until they secure an affirmative vote of the people; declare CHASE is not a TABOR-exempt enterprise; declare SB 17-267 is void in its entirety because it violated the single-subject requirement; declare Defendants violated the state excess revenue cap by $400.6 million in FY 2017–18; and declare, as a result of the unlawful collection of both charges and the violation of the state excess revenue cap, the people of Colorado are due a $4.9 billion refund, plus the constitutional rate of interest.

DATED this 16th day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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