DISTRICT COURT, CITY & COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Room 256 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; SUSAN E. BIRCH, 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.	
Steven J. Lechner (Reg. No. 19853) Jaimie Cavanaugh (Reg. No. 44639) MOUNTAIN STATES LEGAL FOUNDATION 2596 South Lewis Way Lakewood, Colorado 80227 (303) 292-2021 lechner@mountainstateslegal.com jcavanaugh@mountainstateslegal.com Attorneys for Plaintiffs	Case No.: 2015 CV 32305 Division: 275
SECOND AMENDED AND SUPPLEMENTED COMPLAINT	

Plaintiffs, by and through their undersigned attorneys, hereby file this Second Amended and Supplemented Complaint against Defendants and allege as follows:

INTRODUCTION

1. Plaintiffs seek enforcement of the Taxpayer's Bill of Rights ("TABOR"). Colo. Const. art. X, § 20. The overarching purpose of TABOR is to reasonably restrain the "growth of government." Colo. Const. art. X, § 20(1). To accomplish this, TABOR requires the State to secure "voter approval in advance for … any new tax, tax rate increase …, or a tax policy change directly causing a net tax revenue gain" to the State. *Id*. § 20(4)(a). TABOR also limits the amount of revenue that the State may keep and spend in any particular year. *Id*. § 20(7). If the State's revenues exceed that limit, TABOR requires a refund of the surplus revenue, unless voter approval is obtained to retain the extra money. *Id*. § 20(7)(d).

2. Without a vote of the people, Defendants levied new taxes and/or implemented a tax policy change that directly caused a net tax revenue gain for the State in violation of TABOR. Further, S.B. 17-267, which became effective on July 1, 2017, either created an unlawful "enterprise," or violated TABOR's revenue limit and the "excess state revenues cap." S.B. 17-267 also violated the Colorado Constitution's single-subject requirement. By taking these actions, Defendants have, *inter alia*, violated the rights of Plaintiffs and/or their members to vote on new tax burdens and on how fast the State should grow, as guaranteed by TABOR. Plaintiffs seek declaratory and injunctive relief to abate and correct Defendants' unconstitutional actions.

JURISDICTION AND VENUE

3. This Court has jurisdiction over Plaintiffs' claims for relief pursuant to the Colorado Constitution, article VI, section 9, and article X, section 20. Venue is proper under C.R.C.P. 98(b)(2) in any jurisdiction where Defendants or their agents engaged in unconstitutional behavior. Defendant Colorado Department of Health Care Policy and Financing is headquartered in Denver, Colorado and, thus, venue is proper in this Court.

PARTIES

4. Plaintiff the TABOR Foundation ("Foundation") is a non-profit, membership corporation, which is organized under the laws of the State of Colorado. The Foundation is dedicated to protecting and enforcing TABOR on behalf of its members. The Foundation has members who live and work, pay taxes, and are registered to vote in Colorado. The Foundation and its members have an interest in preventing the unlawful collection and expenditure of tax dollars and ensuring that the State and local government entities conform to the Colorado Constitution, including TABOR. The Foundation has members who have received care at hospitals that paid the charges at issue since FY 2010-11. The Foundation has at least one member who has private health insurance and has received and/or paid for outpatient and/or inpatient services provided by a hospital that pays the charges at issue in this case. Additionally,

the Foundation has members who would have received a taxpayer refund under TABOR in FY 2018-19, but for the enactment of S.B. 17-267.

5. Plaintiff Colorado Union of Taxpayers Foundation ("CUT") is a non-profit, membership corporation, which is organized under the laws of the State of Colorado. CUT was formed to educate the public as to the dangers of excessive taxation, regulation, and government spending. CUT is dedicated to the proper interpretation and implementation of TABOR. CUT has members who live and work, pay taxes, and are registered to vote in Colorado. CUT and its members have an interest in preventing the unlawful collection and expenditure of tax dollars and ensuring that the State and local government entities conform to the Colorado Constitution, including TABOR. CUT has at least one member who has private health insurance and has received and/or paid for outpatient and/or inpatient services provided by a hospital that pays the charges at issue in this case. Additionally, CUT has members who would have received a taxpayer refund under TABOR in FY 2018-19, but for the enactment of S.B. 17-267.

6. Plaintiff Rebecca R. Sopkin is a citizen of the United States and a resident of Jefferson County, Colorado. Ms. Sopkin is a Colorado taxpayer, is registered to vote in Colorado, and is a member of Plaintiff TABOR Foundation. Ms. Sopkin and her family have private health insurance. Since FY 2010-11, Ms. Sopkin and/or her dependent family members have received outpatient and/or inpatient services provided by hospitals that pay the charges at issue in this case. In addition, Ms. Sopkin would have received a taxpayer refund under TABOR in FY 2018-19, but for the enactment of S.B. 17-267.

7. Plaintiff James S. Rankin is a citizen of the United States and a resident of Weld County, Colorado. Mr. Rankin is a Colorado taxpayer and is registered to vote in Colorado. Mr. Rankin has private health insurance. In 2017, Mr. Rankin received outpatient and/or inpatient services provided by a hospital that pays the charges at issue in this case. In addition, Mr. Rankin would have received a taxpayer refund under TABOR in FY 2018-19, but for the enactment of S.B. 17-267.

8. Defendant Colorado Department of Health Care Policy and Financing ("Department") is the department that oversees and operates the State's Medicaid program and other public health care programs. C.R.S. § 24-1-119.5. H.B. 09-1293 authorized the Department to levy and collect "health care-related taxes," as described in 42 C.F.R. § 433.68(b), "on outpatient and inpatient services" provided by hospitals. 2009 Colo. Sess. Laws 633–34. The Department levied and collected these "health care-related taxes" in violation of TABOR in FY 2010-11 through FY 2016-17.

9. Defendant Colorado Healthcare Affordability and Sustainability Enterprise ("CHASE") was created by S.B. 17-267. 2017 Colo. Sess. Laws 1450–52. CHASE operates within the Department and took over the levying and collecting of the "health care-related taxes," as described in 42 C.F.R. § 433.68(b), on July 1, 2017. 2017 Colo. Sess. Laws 1450–52. Upon information and belief, CHASE has levied and collected these "health care-related taxes" in violation of TABOR since July 1, 2017.

10. Defendant Susan E. Birch is the Executive Director of the Department and, in that capacity, oversees the operations and strategic direction of the Department and oversees the operations of CHASE. Defendant Birch is sued in her official capacity.

11. Defendant Colorado State Treasury is responsible for managing the State's tax dollars, the State's cash funds, and the State's General Fund. In FY 2010-11 through FY 2016-17, the Treasury oversaw the use of the "health care-related taxes" for, *inter alia*, General Fund relief. The Treasury is also responsible for managing the cash fund created by S.B. 17-267. 2017 Colo. Sess. Laws 1456.

12. Defendant Walker Stapleton is the Colorado State Treasurer and, in that capacity, "has all of the powers, duties, and obligations conferred upon him by the State Constitution and is the official custodian of all state moneys and securities, unless otherwise expressly provided by law." C.R.S. § 24-36-101. Defendant Stapleton is sued in his official capacity.

13. Defendant State of Colorado is subject to TABOR and is responsible for the enactment and implementation of both H.B. 09-1293 and S.B. 17-267.

BACKGROUND

14. TABOR requires voter approval in advance before a district may levy new taxes or institute a "tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a).

15. TABOR defines a "district" as "the state or any local government, excluding enterprises." Colo. Const. art. X, § 20(2)(b).

16. The "[S]tate," for purposes of TABOR, includes all "departments of the executive branch ...." C.R.S. § 24-77-102(16).

17. 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." *See* C.R.S. § 24-77-103.6(1)(b). Revenues that exceed the "excess state revenues cap" must be refunded, unless the State secures voter approval to keep and spend those revenues. *See* Colo. Const. art. X, § 20(7)(d).

18. TABOR exempts from its voting requirements "enterprises," which are defined as government-owned businesses that: (a) are authorized to issue their own revenue bonds; (b) are not authorized to levy taxes; and (c) do not receive ten percent or more of their annual revenue in grants from "all Colorado state and local governments combined." Colo. Const. art. X, § 20(2)(d); *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 867–68 (Colo. 1995).

19. The preferred interpretation of TABOR is that which "reasonably restrain[s] most the growth of government." Colo. Const. art. X, § 20(1).

20. TABOR grants individuals the right to sue to ensure compliance with TABOR's requirements. Colo. Const. art. X, § 20(1). Such suits must be given "the highest civil priority of resolution." *Id*.

21. Colorado recognizes "broad taxpayer standing" to enforce TABOR's requirements. *See Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) ("Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision such as [TABOR], such an averment satisfies the two-step standing analysis."); *see id*. ("[W]e hold that Petitioners have taxpayer standing to challenge the constitutionality of the transfers of money from the special funds to the state's General Fund and the concomitant expenditure of that money to defray general governmental expense[s] …."); *see also Nicholl*, 896 P.2d at 865–66 (taxpayer had standing to challenge whether highway authority was a lawfully created TABOR-exempt enterprise).

22. Medicaid is a federal-state program that provides federal matching funds to states that have created Medicaid programs. 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. 42 U.S.C. § 1396b. Federal regulations provide that a state can 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).

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

24. The regulations further provide that a state can 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." 42 C.F.R. § 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.

25. H.B. 09-1293 was enacted in 2009, and authorized the Department to levy and collect a charge ("Hospital Provider Charge"), as described in 42 C.F.R. § 433.68(b), on outpatient and inpatient services provided by hospitals, in order to receive federal matching funds. 2009 Colo. Sess. Laws 633–55.

26. The stated purpose of H.B. 09-1293 was to, *inter alia*: (a) "provid[e] a payer source for some low-income and uninsured populations …;" (b) "reduc[e] the number of persons in Colorado who are without health care benefits;" and (c) "reduc[e] the need of health care

providers to shift the cost of providing uncompensated care to other payers[.]" 2009 Colo. Sess. Laws 634.

27. H.B. 09-1293 also created a cash fund ("Hospital Provider Cash Fund") to be comprised of the revenue generated by the Hospital Provider Charge and the federal matching funds. 2009 Colo. Sess. Laws 637–39. All moneys in the Hospital Provider Cash Fund were "subject to annual appropriation by the General Assembly for" general expenses of government, including Medicaid expansion, among other things. *Id*.

28. The Colorado Legislative Council Staff estimated that H.B. 09-1293 would increase the State's revenues by $336.4 million in FY 2009-10 and by $389.5 million in FY 2010-11. Final Fiscal Note H.B. 09-1292 at 3 (May 5, 2009).

29. On or about July 1, 2009, the Department began levying and collecting the Hospital Provider Charge.

30. Upon information and belief and after a reasonable opportunity for further investigation or discovery, hospitals paying the Hospital Provider Charge passed that cost onto their patients.

31. By letter dated March 30, 2010, the Centers for Medicare and Medicaid Services ("CMS") first approved the Department's request to waive the broad-based and uniform tax requirements for the Hospital Provider Charge.[1] In so doing, the 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."

32. S.B. 10-169 was enacted in 2010 and mandated that, for FY 2009-10 and FY 2010-11, a portion of the Hospital Provider Charge revenues and the federal matching funds in the Hospital Provider Cash Fund be used to offset General Fund expenditures in the State Medicaid program. 2010 Colo. Sess. Laws 1445–46.

33. The Department, in its 2014 Annual Report,[2] estimated that S.B. 10-169 provided a total of $99.5 million of General Fund relief in FY 2009-10 and FY 2010-11. 2014 Annual Report at i, 3.

34. S.B. 11-212 was enacted in 2011 and mandated that, for FY 2011-12 and FY 2012-13, a portion of the Hospital Provider Charge revenues and the federal matching funds in the Hospital Provider Cash Fund be used to offset General Fund expenditures for the State Medicaid program. 2011 Colo. Sess. Laws 508–10. Specifically, S.B. 11-212 appropriated from the Hospital Provider Fund $50 million for FY 2011-2012 and $25 million for FY 2012-13 to

[1] A true and accurate copy of CMS's March 30, 2010 letter is attached hereto as Exhibit 1.
[2] A true and accurate copy of the 2014 Annual Report is attached hereto as Exhibit 2.

offset General Fund expenditures for the State Medicaid program. 2011 Colo. Sess. Laws 508–09.

35. The Department, in its 2014 Annual Report, estimated that S.B. 11-212 provided $50 million of General Fund relief in FY 2011-12 and $25 million in General Fund relief in FY 2012-13. 2014 Annual Report at i, 3, 13. The 2014 Annual Report also reflects that Hospital Provider Charge revenues were used for Medicaid expansion in FY 2012-13. *Id*. at 13.

36. The 2014 Annual Report further provides that, between October 2012 and October 2013, eleven different hospitals paid more in Hospital Provider Charges than they received in payments under the Hospital Provider Charge program. 2014 Annual Report at B1–B4.

37. S.B. 13-200 was enacted in 2013 and further expanded the eligibility for the State's Medicaid program and allowed the State's share of these additional costs to be paid out of the Hospital Provider Cash Fund. 2013 Colo. Sess. Laws 897–99. S.B. 13-200 also made the State's Medicaid expansion a statutory entitlement by protecting the Medicaid expansion population from reductions due to insufficient Hospital Provider Charge revenues. 2013 Colo. Sess. Laws 897–99.

38. The Hospital Provider Charge, combined with federal matching funds, provided $640.6 million of General Fund relief in FY 2013-14 for Medicaid expansion.

39. The Hospital Provider Charge, combined with federal matching funds, provided $1.45 billion of General Fund relief in FY 2014-15 for Medicaid expansion.

40. The Department, in its 2017 Annual Report,[3] estimated that the revenue collected from the Hospital Provider Charge, combined with federal matching funds, provided $1.89 billion of General Fund relief in FY 2015-16 for Medicaid expansion. 2017 Annual Report at 12.

41. In FY 2010-11 through FY 2016-17, Hospital Provider Charge revenues were used for *inter alia*, offsetting General Fund expenditures, providing General Fund relief, and/or defraying the general expenses of government, including Medicaid expansion.

42. The State did not hold a TABOR vote seeking approval of the Hospital Provider Charge before Defendants levied the Hospital Provider Charge and/or used revenues therefrom to offset General Fund expenditures, provide General Fund relief, and/or defray the general expenses of government, including Medicaid expansion.

43. In 2015, the Office of Legislative Legal Services ("OLLS") issued a memorandum analyzing whether the Hospital Provider Charge program could be organized as a

[3] A true and accurate copy of the 2017 Annual Report is attached hereto as Exhibit 3.

TABOR-exempt enterprise. Memorandum from OLLS to Sen. B. Cadman (Dec. 31, 2015) ("2015 OLLS Memorandum").

44. OLLS concluded that the Hospital Provider Charge program could not be organized as a TABOR-exempt enterprise. 2015 OLLS Memorandum at 4–6.

45. Despite the 2015 OLLS Memorandum, on May 30, 2017, Governor Hickenlooper signed S.B. 17-267 into law. S.B. 17-267 maintained the Hospital Provider Charge, but renamed it the "healthcare affordability and sustainability fee" ("Healthcare Charge") and created CHASE within the Department to levy and collect the Healthcare Charge. 2017 Colo. Sess. Laws 1451–52.

46. S.B. 17-267 took effect on July 1, 2017 (the first day of FY 2017-18) subject to the CMS waiving the broad-based and uniform tax requirements for CHASE's collection of the Healthcare Charge prior to that date. *See* 2017 Colo. Sess. Laws 1450; 42 C.F.R. § 433.68(e). Upon information and belief, CMS waived the broad-based and uniform tax requirements for CHASE's collection of the Healthcare Charge. This waiver constitutes a determination that the Healthcare Charge qualifies as a "health care-related tax" for purposes of 42 C.F.R. § 433.68(b).

47. Pursuant to S.B. 17-267, CHASE is directed to collect the Healthcare Charge from hospitals, leverage those funds to obtain federal matching funds, and distribute funds to hospitals and defray general expenses of government, including the Medicaid expansion. 2017 Colo. Sess. Laws 1451–53.

48. CHASE is authorized to levy and collect the Healthcare Charge in exactly the same manner in which the Hospital Provider Charge was levied and collected by the Department prior to the creation of CHASE. *Compare* 2017 Colo. Sess. Laws 1450–56 *with* 2009 Colo. Sess. Laws 634–37.

49. The net impact of the Healthcare Charge program is "generally redistributive" so that it qualifies as a "health care-related tax[,]" pursuant to 42 C.F.R. § 433.68(b). 2017 Colo. Sess. Laws 1453–54.

50. S.B. 17-267 prohibits hospitals from listing the Healthcare Charge as a "separate line item" on its billing statements. 2017 Colo. Sess. Laws 1456. S.B. 17-267, however, does not expressly prohibit hospitals from passing on the cost of the Healthcare Charge to their patients. Upon information and belief and after a reasonable opportunity for further investigation and/or discovery, hospitals that pay the Healthcare Charge pass that cost onto their patients.

51. Upon information and belief and after a reasonable opportunity for further investigation or discovery, a significant portion of the funds collected by the CHASE are used to offset General Fund expenditures, provide General Fund relief, and/or defray the general expenses of government, including Medicaid expansion. 2017 Colo. Sess. Laws 1452–53, 1456–58.

52. Defendants did not secure voter approval in advance for the Healthcare Charge being levied and collected by CHASE.

53. The amount of the Hospital Provider Charge/Healthcare Charge is not reasonably related to the cost of any services received by the hospitals. For example, hospitals are charged *more* for care provided to non-Medicaid patients than for care provided to Medicaid patients. 2017 Report at A1. Yet, the hospitals who provide care to more Medicaid patients receive higher payments. *See id.* at A2–A3.

54. Upon information and belief and after a reasonable opportunity for further investigation and/or discovery, the Hospital Provider Charge/Healthcare Charge is passed onto non-Medicaid patients, including Plaintiffs and their members, whose increased payments subsidize both the Medicaid expansion and the supplemental payments to hospitals for treating more Medicaid patients.

55. The Hospital Provider Charge/Healthcare Charge is levied for the benefit of the general public and is a tax. *See Barber*, 196 P.3d at 249 (Colo. 2008) ("[I]f the … primary purpose for the charge is to raise revenues for general governmental spending, then it is a tax.").

56. Because the Medicaid expansion is now a statutorily mandated entitlement program, the Healthcare Charge collected by CHASE will continue to be used to defray the general expenses of government and as a form of General Fund relief.

57. The total amount of Hospital Provider Charge expenditures that was allocated for Medicaid expansion in FY 2015-16 was $1.88 billion, more than half of the total Hospital Provider Charge expenditures. 2017 Annual Report at 14. A portion of that Medicaid expansion was funded directly by Hospital Provider Charge revenues. *Id.*

58. Like the Hospital Provider Charge before it, the Healthcare Charge is not imposed for the specific purpose of allowing CHASE to defray the costs of providing business services to hospitals and is not a fee-for-service charge. *Cf. Nicholl*, 896 P.2d at 875.

59. Nor is the Healthcare Charge collected at rates that are reasonably based on any services received by the hospitals. 2015 OLLS Memorandum at 5–6.

60. The Healthcare Charge authorized to be levied and collected by CHASE pursuant to S.B. 17-267 is a tax that is subject to TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a).

61. CHASE is neither a government-owned business, nor a TABOR-exempt enterprise because, *inter alia*, the Healthcare Charge is a tax and CHASE acts like a customer of hospitals, rather than as a business. *Nicholl*, 896 P.2d at 868 (Explaining that an enterprise functions as a "business" when it conducts an activity "in the pursuit of benefit, gain, or

livelihood."); *see* 2015 OLLS Memorandum at 6. Thus, CHASE is a district as defined by TABOR. Colo. Const. art. X, § 20(2)(b); *see* C.R.S. § 24-77-102(16).

62. Because CHASE is a district, it must comply with TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(b).

63. When State revenues subject to TABOR exceed the "excess state revenues cap," taxpayers are entitled to a refund. Colo. Const. art. X, § 20(7)(d).

64. When an existing state government entity becomes an enterprise, the General Assembly is required to make a corresponding downward adjustment to the "excess state revenues cap." Colo. Const. art. X, § 20(7)(d); *see* C.R.S. § 24-77-103.6(6)(b)(I).

65. Colorado Legislative Council Staff estimated that State revenues would exceed the "excess state revenues cap" by $288.6 million in FY 2018-19, triggering a taxpayer refund under TABOR. Final Fiscal Note S.B. 17-267 at 10 (July 12, 2017).

66. Plaintiffs and their members are among those taxpayers who would have been entitled to a refund under TABOR, but for S.B. 17-267.

67. In passing S.B. 17-267, the General Assembly created CHASE in an attempt to avoid the "excess state revenues cap" by changing the classification of Healthcare Charge revenues from State revenue subject to TABOR to TABOR-exempt enterprise revenues. *See* 2017 Colo. Sess. Laws 1449–50; *see also* Budget Request from Governor J. Hickenlooper at 2–8 (Nov. 1, 2016).

68. Colorado Legislative Council Staff recognized that "[w]hen 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." Final Fiscal Note S.B. 17-267 at 5 (emphasis added); *see* Colo. Const. art. X, § 20(7)(d) ("Qualification or disqualification as an enterprise shall change district bases and future year limits."); *see also* C.R.S. § 24-77-103.6(6)(b)(I).

69. S.B. 17-267 exempted anticipated Healthcare Charge revenues of $600.6 million in FY 2017-18 from State revenue subject to TABOR. *See* Final Fiscal Note S.B. 17-267 at 5, 10–11. S.B. 17-267, however, decreased the "excess state revenues cap" by only $200 million. 2017 Colo. Sess. Laws 1451.

70. By failing to make a corresponding downward adjustment to the "excess state revenues cap," S.B. 17-267 allows the State to keep and spend approximately $400 million in excess of the "excess state revenues cap" established by the voters. This action directly eliminates a $288.6 million refund in FY 2018-19 that would otherwise be due to taxpayers under TABOR. Final Fiscal Note S.B. 17-267 at 1, 10.

71. No vote has been held to increase the TABOR revenue limit or the "excess state revenues cap" established by the voters.

72. Because S.B. 17-267 did not make a corresponding downward adjustment of $600.6 million to the "excess state revenues cap" or obtain voter approval to increase the cap, it violates TABOR. Colo. Const. art. X, § 20(7)(d).

73. The Colorado Constitution requires all bills passed by the General Assembly, except appropriation bills, to "contain[]… one subject, which shall be clearly expressed in its title [….]" Colo. Const. art. V, § 21. This is known as the "single-subject requirement" and ensures that the matters encompassed in a piece of legislation are "connected to each other rather than disconnected or incongruous." *People v. Montgomery*, 342 P.3d 593, 596 (Colo. App. 2014); *see also In re Breene*, 24 P. 3, 3–4 (Colo. 1890).

74. The single-subject requirement is intended "to prevent abuses such as log rolling (the practice of jumbling together in one act incongruous subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits), riders …, and omnibus appropriation bills." *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1383 (Colo. 1985) (internal quotations omitted).

75. Where a bill or an initiative "seeks to accomplish more than one purpose, and the two purposes are not connected to each other, the initiative violates the single subject [requirement] …." *Cf. In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 440, 442 (Colo. 2002) (internal quotation omitted) (applying the same single-subject requirement to ballot initiatives as that applicable to bills passed by the General Assembly).

76. The unconstitutional provisions of an act may be severed if the legislature would have been satisfied with what remained. *See Stiens v. Fire & Police Pension Ass'n*, 684 P.2d 180, 184 (Colo. 1984).

77. The Colorado Constitution also provides, "if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void … as to so much thereof as shall not be so expressed." Colo. Const. art. V, § 21.

78. The full title of S.B. 17-267 is "An Act concerning the sustainability of rural Colorado." 2017 Colo. Sess. Laws 1437.

79. S.B. 17-267 is not a general appropriation bill.

80. S.B. 17-267 does not contain a severability clause.

81. S.B. 17-267 contains several unrelated provisions regarding various subjects, including, *inter alia*: (1) tax credits for small businesses; (2) an increase in marijuana sales tax to

fund public schools; (3) an increase in Medicaid copays; (4) authorization of lease-purchase agreements to fund capital construction projects; (5) state agency budget cut requirements; (6) creation of CHASE and renaming the Healthcare Charge; and (7) a $200 million decrease of the "excess state revenues cap."

82. After a reasonable opportunity for further investigation or discovery, the provisions relating to CHASE and the Healthcare Charge would not have been passed absent the unrelated provisions regarding capital construction projects, Medicaid copays, tax exemptions, etc.

83. S.B. 17-267 addresses multiple subjects that are unconnected and incongruous, and which are so tangentially related to the amorphous "rural Colorado" title as to render the single-subject requirement meaningless. *See In re House Bill No. 1353*, 738 P.2d at 373.

84. No subject included in S.B. 17-267 is expressed in the title "concerning the sustainability of rural Colorado."

85. S.B. 17-267 violates the Colorado Constitution's single-subject requirement.

FIRST CLAIM FOR RELIEF
(FY 2010-11)

86. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

87. TABOR requires voter approval in advance before a district may levy and collect any new taxes. Colo. Const. art. X, § 20(4)(a).

88. For purposes of TABOR, the Department is a "district." Const. art. X, § 20(2)(b); C.R.S. § 24-77-102(16). Thus, the Department is subject to TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a).

89. The plain meaning of the word "tax" is a government charge imposed to defray the general expenses of government. *See Federal Power Comm'n v. New England Power Co*., 415 U.S. 345, 350 (1974) (A charge is a tax "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public." (internal quotations omitted)).

90. H.B. 09-1293 authorized the Department to levy and collect the Hospital Provider Charge on outpatient and inpatient services provided by hospitals. 2009 Colo. Sess. Laws 633–55.

91. In FY 2010-11, the Department collected the Hospital Provider Charge from hospitals providing outpatient and inpatient services.

92. Pursuant to H.B. 09-1293 and S.B. 10-169, the Department levied and collected the Hospital Provider Charge in FY 2010-11 for the purpose of, *inter alia*, offsetting General Fund expenditures, providing General Fund relief, and/or defraying the general expenses of government. *See* 2010 Colo. Sess. Laws 1445.

93. Pursuant to federal law, the Hospital Provider Charge levied and collected by the Department in FY 2010-11 was a "health-care related tax." 43 C.F.R. § 433.68(b).

94. The Hospital Provider Charge levied and collected by the Department in FY 2010-11 was a tax for purposes of TABOR.

95. Because the Hospital Provider Charge levied and collected in FY 2010-11 was a tax, it was subject to TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a).

96. No TABOR vote was held to authorize the Department to levy and collect this tax in FY 2010-11.

97. The Hospital Provider Charge levied and collected by the Department in FY 2010-11 violated TABOR.

98. TABOR also requires voter approval in advance for all tax policy changes directly causing a net tax revenue gain to the State. Colo. Const. art. X, § 20(4)(a).

99. A tax policy change occurs for purposes of TABOR when, *inter alia*, new taxes are imposed, new activities are taxed, new items are taxed, or tax exemptions are removed.

100. A net tax revenue gain occurs for purposes of TABOR when, *inter alia*, a good faith fiscal analysis estimates that a district would realize net tax revenue gain from the tax policy change.

101. H.B. 09-1293 authorized the Department to levy and collect the Hospital Provider Charge on outpatient and inpatient services provided by hospitals.

102. Because the Hospital Provider Charge is a tax, H.B. 09-1293 effectuated a tax policy change for purposes of TABOR by authorizing the Department to levy and collect the Hospital Provider Charge.

103. The Colorado Legislative Council Staff estimated that the collection of the Hospital Provider Charge would increase State revenues by $389.5 million in FY 2010-11. Final Fiscal Note H.B. 09-1292 at 1. Because the Hospital Provider Charge is a tax, this "good faith fiscal analysis" shows that the State would realize a net tax revenue gain of $389.5 million in FY 2010-11.

104. Upon information and belief, the Hospital Provider Charge increased the State's revenues by approximately $474.4 million in FY 2010-11.

105. When the Department levied and collected the Hospital Provider Charge in FY 2010-11, it implemented a "tax policy change directly causing a net tax revenue gain" for the State.

106. No TABOR vote was held to authorize the Department to implement this "tax policy change directly causing a net tax revenue gain" for the State.

107. The Hospital Provider Charge levied and collected by the Department in FY 2010-11 violated TABOR.

108. Plaintiffs are entitled to a declaration that the levying and collecting of the Hospital Provider Charge in FY 2010-11 violated TABOR.

109. Plaintiffs are entitled to an order refunding all Hospital Provider Charge revenue collected, kept, or spent unconstitutionally in FY 2010-11, with ten percent annual simple interest calculated from the date of the initial unconstitutional conduct. Colo. Const. art. X, § 20(1).

SECOND CLAIM FOR RELIEF
(FY 2011-12 and FY 2012-13)

110. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

111. In FY 2011-12 and FY 2012-13, the Department collected the Hospital Provider Charge from hospitals providing outpatient and inpatient services.

112. Pursuant to H.B. 09-1293 and S.B. 11-212, the Department levied and collected the Hospital Provider Charge in FY 2011-12 and FY 2012-13 for the purpose of, *inter alia*, offsetting General Fund expenditures, providing General Fund relief, and/or defraying the general expenses of government. *See* 2011 Colo. Sess. Laws 508–509.

113. Pursuant to federal law, the Hospital Provider Charge levied and collected by the Department in FY 2011-12 and FY 2012-13 was a "health-care related tax." 43 C.F.R. § 433.68(b).

114. The Hospital Provider Charge levied and collected by the Department in FY 2011-12 and FY 2012-13 was a tax for purposes of TABOR.

115. Because the Hospital Provider Charge levied and collected in FY 2011-12 and FY 2012-13 was a tax, it was subject to TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a).

116. No TABOR vote was held to authorize the Department to levy and collect this tax in FY 2011-12 and FY 2012-13.

117. The Hospital Provider Charge levied and collected by the Department in FY 2011-12 and FY 2012-13 violated TABOR.

118. H.B. 09-1293 authorized the Department to levy and collect the Hospital Provider Charge on outpatient and inpatient services provided by hospitals.

119. Because the Hospital Provider Charge is a tax, H.B. 09-1293 effectuated a tax policy change for purposes of TABOR by authorizing the Department to levy and collect the Hospital Provider Charge.

120. The Hospital Provider Charge increased the State's revenues by $618.7 million in FY 2011-12, and by $661.8 million in FY 2012-13. *See*, *e.g.*, 2014 Annual Report at 4.

121. Because the Hospital Provider Charge is a tax, the State realized a net tax revenue gain of $618.7 million in FY 2011-12 and $661.8 million in FY 2012-13.

122. When the Department levied and collected the Hospital Provider Charge in FY 2011-12 and FY 2012-13, it implemented a "tax policy change directly causing a net tax revenue gain" for the State.

123. No TABOR vote was held to authorize the Department to implement this "tax policy change directly causing a net tax revenue gain" for the State.

124. The Hospital Provider Charge levied and collected by the Department in FY 2011-12 and FY 2012-13 violated TABOR.

125. Plaintiffs are entitled to a declaration that the levying and collecting of the Hospital Provider Charge in FY 2011-12 and FY 2012-13 violated TABOR.

126. Plaintiffs are also entitled to an order refunding all Hospital Provider Charge revenue collected, kept, or spent unconstitutionally in FY 2011-12 and FY 2012-13, with ten percent annual simple interest calculated from the date of the initial unconstitutional conduct. Colo. Const. art. X, § 20(1).

THIRD CLAIM FOR RELIEF
(FY 2013-14 through FY 2016-17)

127. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

128. Pursuant to H.B. 09-1293 and S.B. 13-200, the Department levied and collected the Hospital Provider Charge in FY 2013-14 through FY 2016-17 for the purpose of, *inter alia*, offsetting General Fund expenditures, providing General Fund relief, and/or defraying the general expenses of government. *See* 2013 Colo. Sess. Laws 897–509.

129. Pursuant to federal law, the Hospital Provider Charge levied and collected by the Department in FY 2013-14 through FY 2016-17 was a "health-care related tax." 43 C.F.R. § 433.68(b).

130. The Hospital Provider Charge levied and collected by the Department in FY 2013-14 through FY 2016-17 was a tax for purposes of TABOR.

131. Because the Hospital Provider Charge levied and collected in FY 2013-14 through FY 2016-17 was a tax, it was subject to TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a).

132. No TABOR vote was held to authorize the Department to levy and collect this tax in FY 2013-14 through FY 2016-17.

133. TABOR requires voter approval in advance for all tax policy changes directly causing a net tax revenue gain to the State. Colo. Const. art. X, § 20(4)(a).

134. H.B. 09-1293 authorized the Department to levy and collect the Hospital Provider Charge on outpatient and inpatient services provided by hospitals.

135. Because the Hospital Provider Charge is a tax, H.B. 09-1293 effectuated a tax policy change for purposes of TABOR by authorizing the Department to levy and collect the Hospital Provider Charge.

136. The Hospital Provider Charge increased the State's revenues in FY 2013-14 through FY 2016-17. Because the Hospital Provider Charge is a tax, the State realized a net tax revenue gain from the Hospital Provider Charge in FY 2013-14 through FY 2016-17.

137. When the Department levied and collected the Hospital Provider Charge in FY 2013-14 through FY 2016-17, it implemented a "tax policy change directly causing a net tax revenue gain" for the State.

138. No TABOR vote was held to authorize the Department to implement this "tax policy change directly causing a net tax revenue gain" for the State.

139. The Hospital Provider Charge levied and collected by the Department in FY 2013-14 through FY 2016-17 violated TABOR.

140. Plaintiffs are entitled to a declaration that the levying and collecting of the Hospital Provider Charge in FY 2013-14 through FY 2016-17 violated TABOR.

141. Plaintiffs are also entitled to an order refunding all Hospital Provider Charge revenue collected, kept, or spent unconstitutionally in FY 2013-14 though FY 2016-17, with ten percent annual simple interest calculated from the date of the initial unconstitutional conduct. Colo. Const. art. X, § 20(1).

FOURTH CLAIM FOR RELIEF
(Unlawful Enterprise)

142. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

143. S.B. 17-267 renamed the Hospital Provider Charge the "Healthcare Charge" and created CHASE to levy and collect the Healthcare Charge.

144. CHASE levies and collects the Healthcare Charge for the purposes of, *inter alia*, offsetting General Fund expenditures, providing General Fund relief, and/or defraying the general expenses of government. *See* 2017 Colo. Sess. Laws 1448–49, 1452, 1456–60.

145. Pursuant to federal law, the Healthcare Charge is a "health-care related tax." 43 C.F.R. § 433.68(b).

146. The Healthcare Charge levied and collected by CHASE is a tax for purposes of TABOR.

147. CHASE is not a TABOR-exempt enterprise because, *inter alia*, it levies and collects a tax. *Nicholl*, 896 P.2d at 867–69.

148. CHASE is not a TABOR-exempt enterprise because, *inter alia*, it is not a government-owned business "engaging in an activity conducted in the pursuit of benefit, gain or livelihood[.]" *See Nicholl*, 896 P.2d at 868; *see also* 2015 OLLS Memorandum at 5–6.

149. Because CHASE is not a TABOR-exempt enterprise, voter approval in advance was required before the Healthcare Charge could be levied and collected.

150. Because no TABOR vote was held to authorize levying and collecting the Healthcare Charge, the Healthcare Charge violates TABOR.

151. Because the Healthcare Charge is a tax, S.B. 17-267 effectuated a tax policy change for purposes of TABOR by authorizing the levying and collecting of the Healthcare Charge.

152. Because CHASE is not a TABOR-exempt enterprise, the Healthcare Charge will increase State revenues in FY 2017-18 and future years. Because the Healthcare Charge is a tax, the State will realize a net tax revenue gain in FY 2017-18 and future years.

153. When CHASE began levying and collecting the Healthcare Charge, it implemented a "tax policy change directly causing a net tax revenue gain" for the State.

154. No TABOR vote was held to authorize CHASE to implement this "tax policy change directly causing a net tax revenue gain" for the State.

155. The levying and collecting of the Healthcare Charge violates TABOR.

156. Plaintiffs are entitled to a declaration that the levying and collecting of the Healthcare Charge violates TABOR.

157. Plaintiffs are entitled to an order enjoining the levying and collecting of the Healthcare Charge until such time as Defendants secure voter approval.

158. Plaintiffs are entitled to an order refunding all Healthcare Charge revenue collected, kept, and/or spent, with ten percent annual simple interest calculated from the date of the initial unconstitutional conduct. Colo. Const. art. X, § 20(1).

FIFTH CLAIM FOR RELIEF
(Revenue Limits)

159. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

160. S.B. 17-267 defined the "excess state revenues cap" for FY 2017-18 as "an amount that is equal to the excess state revenues cap for the 2016-17 fiscal year …, adjusted for inflation, the percentage change in state population, the qualification or disqualification of enterprises, and debt service changes, *less two hundred million dollars* …." 2017 Colo. Sess. Laws 1442 (emphasis added).

161. TABOR requires that the State's revenue limit be adjusted to compensate for the "[q]ualification or disqualification as an enterprise …." Colo. Const. art. X, § 20(7)(d)

("Qualification or disqualification as an enterprise shall change district bases and future year limits.").

162. The creation of an enterprise to administer an existing state program or the conversion of an existing state entity into an enterprise constitutes the "[q]ualification … as an enterprise[,]" within the plain meaning of TABOR.

163. If a TABOR-exempt enterprise is lawfully created, *i.e*., "qualified," a "change" must be made to the State's "bases and future year limits[,]"Colo. Const. art. X, § 20(7)(d), and the "excess state revenues cap." *See* C.R.S. § 24-77-103.6(6)(b)(I).

164. Assuming CHASE is a lawfully created TABOR-exempt enterprise, S.B. 17-267 violated TABOR and the "excess state revenues cap" because the downward adjustment to the "excess state revenues cap" should have been approximately $600.6 million, not just $200 million.

165. Prior to S.B. 17-267, the revenues generated from the Hospital Provider Charge counted against the State's fiscal year spending and revenue limits. 2015 OLLS Memorandum at 3. For FY 2017-18, that amount was projected to be approximately $600.6 million. Final Fiscal Note S.B. 17-267 at 5. S.B. 17-267, however, excluded this $600.6 million from the State's revenue limits in light of the creation of CHASE. *Id*. at 10–11. Yet, based upon TABOR and the "excess state revenues cap," SB 17-267 should have also reduced the "excess state revenues cap" by $600.6 million, to "correspond" with the amount that was excluded from the State's revenue limit. *See id*. at 3 ("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." (emphasis added)).

166. S.B. 17-267, however, only adjusted the "excess state revenues cap" downward by $200 million. 2017 Colo. Sess. Laws 1451. Thus, by failing to make the "corresponding" downward adjustment to the "excess state revenues cap," S.B. 17-267 allows the State in FY 2017-18 to collect and spend approximately $400.6 million more than authorized by the voters. *See* Colo. Const. art. X, § 20(7)(d); C.R.S. § 24-77-103.6(1)(b). S.B. 17-267 also eliminated a $288.6 million refund in FY 2018-19 that would otherwise be due to taxpayers under TABOR. Final Fiscal Note S.B. 17-267 at 10.

167. No vote has been held to allow the State to exceed TABOR's revenue limit or the "excess state revenues cap."

168. Assuming CHASE is a lawfully created TABOR-exempt enterprise, S.B. 17-267 violated both TABOR and the "excess state revenues cap."

170. Plaintiffs are entitled to declaratory and injunctive relief against the exemption of Healthcare Charge revenues from State fiscal year spending, until such time as voters approve an

increase in the "excess state revenues cap" or the General Assembly makes a corresponding downward adjustment to the "excess state revenues cap."

171. Plaintiffs are entitled to an order refunding all Healthcare Charge revenue collected, kept, or spent in excess of TABOR's revenue limit and/or the "excess state revenues cap," with ten percent annual simple interest calculated from the date of the initial unconstitutional conduct. Colo. Const. art. X, § 20(1).

SIXTH CLAIM FOR RELIEF
(Single-Subject Requirement)

172. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

173. The Colorado Constitution requires all bills passed by the General Assembly, except general appropriation bills, to contain one subject. Colo. Const. art. V, § 21.

174. The Colorado Constitution also provides, "if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Colo. Const. art. V, § 21.

175. S.B. 17-267 contains several unrelated provisions regarding various subjects including, *inter alia*, Medicaid expansion funding, marijuana taxes, tax credits for small businesses, and capital construction projects.

176. After a reasonable opportunity for further investigation or discovery, the passage of the provisions in S.B. 17-267 regarding the creation of CHASE and the Healthcare Charge would not have occurred absent the unrelated provisions regarding capital construction projects, Medicaid copays, tax exemptions, etc.

177. The variety of subjects addressed in S.B. 17-267 are unconnected and incongruous, and are so tangentially related to the amorphous "rural Colorado" title as to render the single-subject requirement meaningless.

178. Although S.B. 17-267's various subjects are loosely characterized as relating to "rural Colorado," S.B. 17-267 seeks to accomplish a variety of purposes, including providing funding for schools, repairing roads, and financing the State's Medicaid expansion.

179. A "mere recitation of these provisions" is sufficient to demonstrate that S.B. 17-267 "embraces such a diversity of subjects as to compel the conclusion that this legislation violates the single subject requirement of Article V, Section 21, of the Colorado Constitution." *In re House Bill No. 1353*, 738 P.2d at 373.

180. Based on the history of S.B. 17-267, the bill was passed by virtue of "log rolling"—the practice of "jumbling together in one act incongruous subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits"—and constitutes an omnibus bill. *See Lamm*, 704 P.2d at 1383 (internal quotation omitted). This result is exactly what the single-subject requirement is intended to avoid. *Id.*

181. Because S.B. 17-267 was the result of "log rolling," and because S.B. 17-267 does not contain a severability clause, it is unclear whether the General Assembly would have passed any provisions of S.B. 17-267 standing alone. Therefore, the unconstitutional provisions of S.B. 17-267 should not be severed; instead, the S.B. 17-267 should be struck down in its entirety.

182. Further, an act or initiative is void insofar as its subject is not "obvious" from its title. *See In re Title, Ballot Title and Submissions Clause, and Summary for 1999-2000 No. 25*, 974 P.2d 458, 464 (Colo. 1999); Colo. Const. art. V, 21.

183. No provision of S.B. 17-267 is expressed in the title "concerning the sustainability of rural Colorado." It is far from obvious that a bill regarding "rural Colorado" addresses funding of the State's Medicaid expansion. Therefore, S.B. 17-267 should be struck down in its entirety.

184. Plaintiffs are entitled to a declaration that S.B. 17-267 violates the Colorado Constitution's single-subject requirement.

185. Plaintiffs are entitled to an order striking down S.B. 17-267 in its entirety.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that Defendants' levying and collecting of the Hospital Provider Charge in FY 2010-11 violated TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a);

B. Declare that Defendants' levying and collecting of the Hospital Provider Charge, in FY 2011-12 and FY 2012-13 violated TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a);

C. Declare that Defendants' levying and collecting of the Hospital Provider Charge in FY 2013-14 through FY 2016-17 violated TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a);

D. Declare that CHASE is not a TABOR-exempt enterprise;

E. Declare that CHASE's levying and collecting the Healthcare Charge violates TABOR's voter approval in advance requirements. Colo. Const. art. X, § 20(4)(a);

F. Enjoin CHASE from levying and collecting the Healthcare Charge until such time as Defendants may secure voter approval;

G. Assuming CHASE is a lawfully created TABOR-exempt enterprise, declare that S.B. 17-267 violated TABOR's revenue limit, Colo. Const. art. X, § 20(7), and the "excess state revenues cap," *See* C.R.S. § 27-77-103.6(6)(b)(I);

H. Enjoin Defendants from exempting Healthcare Charge revenues from State fiscal year spending, until such time as voters approve an increase in the "excess state revenues cap" or the General Assembly makes a corresponding downward adjustment to the "excess state revenues cap";

I. Order Defendants to refund all revenue collected, kept, or spent unconstitutionally in the four full fiscal years preceding the filing of the case, with ten percent annual simple interest calculated from the date of the initial unconstitutional conduct, as required by TABOR, Colo. Const. art. X, § 20(1);

J. Declare that S.B. 17-267 violated the single-subject requirement, Colo. Const. art. V, § 21, and is therefore unconstitutional;

K. Hold unlawful and set aside S.B. 17-267 in its entirety;

L. Award Plaintiffs their costs and reasonable attorneys' fees in accordance with law, including TABOR, Colo. Const. art. X, § 20(1); and

M. Award any other further relief this Court deems just and appropriate.

DATED this 19th day of December 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2017, I served a true and correct copy of the foregoing PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTED COMPLAINT on all counsel of record through Colorado Courts E-Filing System:

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