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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
PLAINTIFFS: TABOR FOUNDATION, *et al.*, v. **DEFENDANTS:** COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, *et al.*, and **INTERVENOR**: Colorado Hospital Association.	▲ **COURT USE ONLY** ▲
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COLORADO HOSPITAL ASSOCIATION'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Intervenor Colorado Hospital Association (CHA), pursuant to C.R.C.P. 56 and 121 § 1-15, responds to the Plaintiffs' motion for summary judgment.

I. SUMMARY

Near the outset of their summary judgment motion, Plaintiffs acknowledge that 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." Plaintiffs' motion at 13.

The answer has been clear enough from prior case law such as *Bloom v. City of Fort Collins*, 784 P.2d 304, 307-11 (Colo. 1989) (distinguishing taxes and fees generally) and *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (distinguishing taxes from fees in the TABOR context). The Supreme Court's recent decision in *Colorado Union of Taxpayers Foundation v. City of Aspen*, 2018 CO 36, now removes any possible doubt: the prior hospital provider fee and current CHASE HASF are fees, not taxes, and are therefore not subject to TABOR voter approval requirements.

As the *Aspen* case explains, there are two ways of looking at the tax v. fee question: one can view fees narrowly as bargained-for-exchanges of equal value between citizens and the government, and treat everything else as a tax; or one can take a broader, more flexible view of fees and a correspondingly narrower view of taxes. The *Aspen* case adopts the latter approach, confirming that government entities may lawfully raise revenue dedicated to specific programs through carefully crafted fees without violating TABOR. While Plaintiffs' advocacy of the former

approach was endorsed by the dissent in the *Aspen* case, it does not reflect the current and correct state of Colorado law. Rather, this Court is bound by and must follow the law established in the actual *Aspen* decision, which confirms that the General Assembly did not violate TABOR in establishing CHASE.

II. RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

The parties generally agree that the operative facts are not disputed, and that Plaintiffs' claims present questions of law appropriate for resolution on summary judgment.

CHA notes briefly that some of Plaintiffs' statements of undisputed facts focus on the use of the word "tax" in one federal regulation. *See* Plaintiffs' motion pp. 2-3, ¶¶ 2 and 10, quoting the phrase "health care-related taxes" in 43 C.F.R. § 433.68(b). However, as CHA explained in its own motion for summary judgment, the phrase "health care related tax" in this federal regulation is a defined term which includes fees. 42 C.F.R. § 433.55(a) ("A health care-related tax is a **licensing fee, assessment, or other mandatory payment**" related to health care services, etc.) (emphasis added). The fact that a federal regulation uses the "T" word does not support Plaintiffs' TABOR position.

III. ARGUMENT

A. The standard of proof remains beyond a reasonable doubt.

Plaintiffs acknowledge their burden to prove the unconstitutionality of SB 17-267 beyond a reasonable doubt – the highest standard of proof known in Anglo-

American jurisprudence. *See* Plaintiffs' motion at 11. Plaintiffs nonetheless argue that this standard is too high for a civil case, and urge the Court to adopt a lower "plain showing" standard. *Id.*

Plaintiffs can of course preserve a challenge to the applicable standard of proof, but this Court is not at liberty to follow Plaintiffs' request to apply a lower standard here. As Plaintiffs acknowledge, the Colorado Supreme Court has recently taken certiorari to review the appropriate standard of proof for constitutional challenges like this one, but has chosen to avoid the constitutional issue and leave the current beyond a reasonable doubt standard intact. *Id.*, n.2, citing *Aspen*, 2018 CO 36 ¶ 14. As a result, the beyond a reasonable doubt standard is applicable and binding, and will remain so unless and until the Colorado Supreme Court revises it.

Plaintiffs' recitation of other aspects of governing legal standards are generally accurate, but omit two important points of applicable jurisprudence referenced in CHA's own summary judgment motion which bear repeating in this round of response briefing:

- **When determining legislative intent (the touchstone of all statutory construction), courts take the General Assembly at its word and defer to declarations contained in statutory language**. *St. Luke's Hospital v. Indus. Comm'n*, 349 P.2d 995, 997-88 (Colo. 1960) ("Perhaps the best guide to intent is the declaration of policy which frequently forms the initial part of an enactment. … When the purpose of an act is expressed in clear and unambiguous terms, this must be accepted as the solemn declaration of the sovereign. The public policy of the state is a matter for the determination of the Legislature and not for the courts."). *See also Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 555 (Colo. 1998) (determining legislative intent

based on legislative policy declaration included in legislation), citing *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246, 252 (Colo. 1996), citing *St. Luke's Hospital.*

- **The General Assembly's powers are at their zenith regarding matters of budget, appropriations, and taxes**. *Colorado Gen. Assembly v. Lamm*, 738 P.2d 1156, 1169 (Colo. 1987); *Qwest Corporation v. Colorado Division of Property Taxation*, 304 P.3d 217, 223 (Colo. 2013) ("The General Assembly has especially broad latitude in creating classifications and distinctions in tax statutes.").

These two rules of statutory construction and general jurisprudence are strongly implicated here, where accepting Plaintiffs' claims and arguments would require the Court to disregard the General Assembly's stated intent regarding SB 17-267, and create a **$5+ billion hole** in the State's budget. *See* Plaintiffs' motion at 40 (asking the Court to order the State to pay, *inter alia*, a $4.9 billion refund, plus 10% simple interest for FY 2010-18).

B. The CHASE Hospital Affordability and Sustainability Fee is a fee, not a tax.

Plaintiffs' first and primary argument challenges the prior hospital provider fee and current CHASE Hospital Affordability and Sustainability Fee (CHASE HASF) as being a tax rather than a fee because it is not levied in a traditional "fee-for-service transaction." *See*, *e.g.*, Plaintiffs' motion at 13. As Plaintiffs acknowledge, this question of "is it a tax or a fee?" is the central dispute in this case.

1. *City of Aspen* confirms that the CHASE HASF is a fee.

The Colorado Supreme Court took up this issue in the recent *City of Aspen* case and rejected Plaintiffs' position. 2018 CO 36, ¶26. *Aspen* involved a city ordinance to eliminate plastic bags and impose a 20 cent "waste reduction fee" on

each paper bag used by grocery store customers. *Id.* ¶ 4. Funds raised by the city through this fee went to fund a waste reduction and recycling program. *Id.* ¶ 6. The Colorado Union of Taxpayers Foundation (also a Plaintiff in this case, and an entity similar to the original Plaintiff TABOR Foundation) challenged the fee because it was not levied as part of a traditional, narrow fee-for-service transaction: Aspen used funds raised by the fee to support a broad municipal waste reduction and recycling program with many components beyond covering the city's costs of disposing of those paper bags.

In rejecting this TABOR challenge, the Colorado Supreme Court first considered the Aspen City Council's stated purpose in enacting the ordinance. *Id.* ¶29. The Supreme Court reviewed the city council's legislative statements deferentially, taking the council at its word. *Id.* Because the purpose of promoting public health, safety and welfare through waste reduction was a legitimate governmental function, the Supreme Court rejected the TABOR-based facial challenge. *Id.*

The Supreme Court then turned to the issue of whether the bag fee functioned as a tax, which required the Court to address the key question here: whether TABOR requires fees to consist of narrow-constituted fee-for-service exchanges of like value. Since TABOR does not define taxes or fees, the Court was required to construe these terms. *Id.* ¶¶ 17, 37. The Supreme Court rejected the narrow fee-for-service model, holding that the bag fee could be "part of a larger

regulatory scheme" without losing its character as a fee, so long as the fee was dedicated to a specific regulatory program and not used for general government expenditures. *Id.* ¶¶23-27, 30. The Supreme Court also held that even though the city did not spend 20 cents to dispose of each paper grocery bag, the 20 cent per bag charge was a reasonable way to raise money to support the city government's broad waste reduction scheme. *Id.* ¶¶31-32.

Three dissenting justices would have preferred a narrower view of fees, in which fees are limited to exchanges of comparable value between citizens and the government. *E.g. id.* at ¶38 (Coats, J. dissenting, arguing that fees should be viewed as "a charge for no more than the value or cost of some benefit—whether that be in the form of a privilege, a franchise, a license, a permit, or a good or service—provided by the government to a purchaser, or payer, [that] does not amount to raising revenue at all, but is rather in the nature of a sale or direct exchange of things of comparable value, as in any proprietary transaction").

Plaintiffs' argument here is based upon the rejected view of the *Aspen* dissent, *i.e.* the contention that the former hospital provider fee and current CHASE HASF should not be viewed as a fee (and therefore must supposedly be viewed as a tax) because it is not a traditional comparable-value exchange between citizens and the government. *E.g.* Plaintiffs' motion at 17 (arguing that the "Hospital Provider Charge did not operate as a fee-for-service transaction"). But prior cases like *Bloom* and *Ritter* held, and *Aspen* now re-confirms, that the former hospital provider fee

and current CHASE HASF need not be traditional fee-for-service transactions. Just as the Aspen bag fee funded a city government program to reduce waste, the CHASE HASF funds a government enterprise that supports health care. The effective purpose of the CHASE HASF is to enhance the value of state-generated funds by taking advantage of available federal Medicaid matching funds. As the State formerly did with the hospital provider fee, CHASE uses the HASF to generate a revenue stream that can be supplemented by the federal government pursuant to established law and then redistributed for health care purposes. C.R.S. § 25.5-4-402.4(2)(d)(I). Within regulatory parameters, the more money the HASF generates, the more financial participation is received from the federal government. Plaintiffs' motion at 19, 24. That is why the dollars at stake here are so large: failing to take advantage of these federal matching funds would be fiscally untenable, especially given the fiscal constraints that TABOR already imposes on the State budget.

The CHASE HASF (like the hospital provider fee before it) thus squarely fits into the broad and flexible view of fees articulated by the Supreme Court in *Aspen*: the CHASE HASF is a carefully crafted fee that supports a regulatory program specifically dedicated to enhancing the quality of and expanding access to important health care services delivered at Colorado hospitals. The money raised through the HASF is not a tax because it is not raised or used to fill the State's general fund, but is instead dedicated to and used to support Colorado's hospitals in their mission to

deliver high quality accessible health care to all Colorado citizens, including the especially difficult-to-serve populations in Colorado's rural communities. *See* C.R.S. § 25.5-4-402.4(2) (legislative declaration); *Aspen*, *supra*; *accord Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 8 (Colo. 1993) (TABOR "places limits on the growth of government revenues, without prior voter approval, as a whole. It does not, however, forbid the dedication of a part of that whole to a specific purpose."). The Aspen dissent offers a contrary view which is governing law. Rather, the majority decision in *Aspen* answers the multi-billion dollar question of whether the hospital provider fee and CHASE HASF are taxes or fees. Under the applicable facts and governing law, the hospital provider fee and CHASE HASF are fees that are not subject to TABOR approval requirements.

2. Snippets from less authoritative and distinguishable cases cannot displace the controlling authority of *Aspen*.

Plaintiffs argue that because some hospitals don't benefit from the CHASE HASF, it cannot be a proper fee. Plaintiffs' motion at 15. Plaintiffs attempt to support this position by quoting a Court of Appeals opinion out of context. Plaintiffs assert:

> 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).

Id. The Court could properly consider and then disregard this intermediate appellate decision because it cannot prevail over the Colorado Supreme Court's

most apposite (and coincidentally recent) decision in *City of Aspen*. But it is instructive to review this citation for accuracy.

In *Bruce*, Douglas Bruce brought a *pro se* action against Colorado Springs asserting that the city's street light service charge and cable television franchise charge were taxes requiring voter approval under TABOR. 131 P.3d at 1189. The Court of Appeals rejected both of Bruce's positions. The cable television fee consisted of charges that the cable provider collected from its subscribers and then paid to the City under a voter-approved franchise agreement. *Id.* at 1192. The Court of Appeals noted that cities routinely enter into contracts with utilities and other service providers, and charge the residents who use these services appropriate fees for the services. *Id.* In so holding, the Court of Appeals wrote:

> **The charges for use of a public facility owned by a municipality** are not ordinarily considered taxes because they are imposed only on those using the services provided **to defray the expense of operating or improving the facility**….
>
> Municipalities routinely charge a franchise fee for the right to operate a cable television system within their jurisdiction. Franchise fees are not taxes, but rather are the price paid to rent use of public rights-of-way.

Bruce, 131 P.3d at 1192 (emphases added, citations omitted). Plaintiffs quote the underlined words out of context to assert that the Court must apply a narrow fee-for-service model in this TABOR case. However, the bolded portion of the quotation, which Plaintiffs ignore, confirms that the Court of Appeals was not

making a general statement about fees under TABOR, but was addressing only fees charged for use of a public facility.

The cable television fee addressed in *Bruce* is an example of a fee that fits neatly into the fee-for-service model that the *Aspen* dissenters would prefer to apply. *Id.*; *Aspen*, 2018 CO 36, ¶38. But the Supreme Court's majority opinion in *Aspen* controls, and recognizes that fees are not so limited. *Bruce* is therefore neither controlling nor persuasive here on the issue of what constitutes a fee under TABOR.

The Court of Appeals in *Bruce* did, however, make an apt observation about the hierarchical nature of Colorado's courts, and the obligation of lower courts to follow controlling decisions from the Colorado Supreme Court:

> In any event, we are bound to follow *Bloom v. City of Fort Collins* and its progeny. While it could be argued that the *Bloom* analysis of special fees has led, and will lead, to almost any governmental service being structured as a fee, thereby escaping TABOR, **it is not for this intermediate court to change a test announced by our supreme court**, anymore than it would be our place to rewrite TABOR or the City Charter.

Bruce, 131 P.3d at 1191 (emphases added, citing *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989), other citations omitted).

Just as *Bloom* controlled the Court of Appeals' analysis in *Bruce*, so too does the recent *Aspen* decision control this Court's present analysis. However persuasive a narrow fee-for-service model might seem to its committed advocates, this Court must apply the Colorado Supreme Court's current resolution of the fee versus tax

question to Plaintiffs' TABOR challenge to the CHASE HASF. Under the controlling view, the CHASE HASF is unquestionably a fee that is not subject to TABOR.

C. CHASE is a lawful enterprise.

Plaintiffs' brief argument that CHASE is not a lawful enterprise is based entirely on Plaintiffs' position that the prior hospital fee and current CHASE HASF are taxes rather than TABOR-exempt fees. Plaintiffs' motion at 25-26 (arguing that CHASE cannot be a business because it imposes taxes).

Once the Court resolves the tax versus fee question in favor of fees, as it must under *Aspen*, the remaining enterprise analysis is covered by enterprise case law such as *TABOR Foundation v. Colorado Bridge Enterprise*, 2014 COA 106. As discussed in CHA's summary judgment motion, and not challenged in Plaintiffs' motion, *Colorado Bridge* recognizes that as government businesses, enterprises do not have to resemble traditional private for-profit businesses. Rather, one reason the government creates enterprises is to provide services that would not naturally emerge from private sector forces but are needed to support public health, safety and welfare (like bridge maintenance, or accessible and affordable healthcare services which require special support for rural hospitals). *Id.* ¶¶ 58-60; *see also e.g. People v. Hupp*, 53 Colo. 80, 85, 123 P. 651, 653 (1912) ("The welfare of the people is the supreme law" that drives all state government functions; so it "belongs

to the legislative department … to determine primarily what measures are appropriate and needful for the protection of … the public health [and] safety.").

Defendants offered *Colorado Bridge* as clear and persuasive authority supporting CHASE, once the Enterprise became an issue in this action with its creation in 2017. The Court of Appeals' analysis in *Colorado Bridge* applied the holdings of *Bloom v. Fort Collins* and *Barber v. Ritter* that fees need not be traditional exchanges of money from citizens for government services of comparable value, but can be charges supporting a specific and dedicated government program that might not benefit all fee payers equally, or at all. *Id.* ¶¶ 21. This controlling view of fees confirmed that the Colorado Bridge Enterprise was a proper enterprise, even though correlation between fee payers and bridge users was less than perfect. *Id.* at ¶¶35-46. The analysis of *Colorado Bridge* is not only well-supported by *Bloom* and *Barber*, but has recently been corroborated by *Aspen* 's tax versus fee holding.

Colorado Bridge, supplemented by *Aspen*, confirms that CHASE is a lawful enterprise that does not violate TABOR. *See* CHA's summary judgment motion at 8, 10-12. Because Plaintiffs do not even address this dispositive authority, they have effectively conceded the point.

D. SB 17-267 does not violate the Colorado Constitution's single-subject requirement for statutes.

Plaintiffs' single-subject challenge is based on the position that the Constitution's single-subject requirement for statutes flatly prohibits "log-rolling" – the practice of combining disparate provisions into one bill to garner support and

enable a bill's passage. However, the applicable and still controlling authority of *Catron v. Board of Com'rs of Archuleta County*, 33 P. 513, 514 (Colo. 1893) holds that while "log-rolling" may be undesirable, Article V Section 21 does not prevent this unavoidable aspect of modern legislative practice. The purpose of the Section 21 single-subject requirement is notice, which is not an issue here since all legislators and the public had adequate notice of the legislative actions that resulted in SB 17-267, including real-time access to the bill drafts via the General Assembly's website.

1. Section 21 case law applies, not Section 1(5.5) case law

Plaintiffs argue that SB 17-267 violates Article V Section 21 (the single-subject provision for statutes), but Plaintiffs nonetheless cite only two Section 21 cases in their argument. The bulk of Plaintiffs' authority consists of more recent and extensive – but inapplicable – case law addressing single-subject challenges to ballot initiatives under the Article V Section 1(5.5). *See* Plaintiffs' motion at 27-33, citing eight Section 1(5.5) cases.

As explained in CHA's motion for summary judgment, there is no reason to consider distinct Section 1(5.5) case law in determining the Section 21 question actually at issue in this case. Section 21 is an original provision of the Colorado Constitution, modeled on similar constitutional provisions from other states. Section 1(5.5), by contrast, is recent and unique to Colorado, having been added to the Constitution through legislative referral in 1994 in the wake of the upheaval

wrought by TABOR. *Matter of Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Board Pertaining to a Proposed Initiative Public Rights in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995).

Plaintiffs correctly note that Section 1(5.5) cases borrow from the well-developed body of case law interpreting Section 21, applying the same analysis and tests. Plaintiffs' motion at 28 n.14, citing *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 25*, 974 P.2d 458 (Colo. 1999). That is because the Supreme Court had to borrow from earlier Section 21 case law to develop a jurisprudence for reviewing ballot initiatives for single-subject compliance under the then-novel Section 1(5.5). The reverse is not true: this Court does not need to draw upon recent ballot initiative case law to address statutory single-subject analysis, which the Supreme Court has been articulating since statehood. There is no dearth of relevant Section 21 cases; and modern cases like *In re No. 25* confirm that the older Section 21 case law is still good law. *See In re No. 25*, 974 P.2d at 461 and 463 (citing to and relying upon the "trio of [Section 21] cases decided around the turn of the century": *In re Breene*, 24 P. 3 (Colo. 1890); *Catron*, *supra*; and *People ex rel. Elder v. Sours*, 74 P. 167 (Colo. 1903)).[1] Accordingly, the apparent similarity of the applicable tests thus does not provide a good reason to

[1] *Accord In re Title, Ballot Title, Submission Clause for 2007-2008 Sect. 62,* 184 P.3d 52, 67 (Colo. 2008) (citing and approving same trio of early Section 21 cases); *In re Title, Ballot Title and Submission Clause for 2005-2006 #'74*, 136 P.3d 237, 239 and 244 (Colo. 2006) (same); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #'43*, 46 P.3d 438, 440 (Colo. 2002) (same).

ignore controlling Section 21 case law in favor of Section 1(5.5) case law. This Court can and should limit itself to actual Section 21 case law in reviewing Plaintiffs' arguments.

A further reason for the Court to confine its Section 21 analysis to actual Section 21 cases is the profound political and procedural differences between statutes and ballot initiatives. When members of the General Assembly draft, consider, debate and enact bills, those bills go through a thorough selection and vetting process. Members of the General Assembly are professional legislators with deeper knowledge of Colorado's constitution and statutes than the average layperson. Bills must attract legislative sponsors to move forward. The General Assembly has a large staff of legislative professionals who analyze each bill and report on how it interacts with the Constitution and other laws, as well as its anticipated costs. A bill is then reviewed and debated by committees in multiple hearings in both the House and Senate before it gets to the floor for a final vote. This process imposes a formidable gauntlet for any statutory change, and insures that those bills making it to the finish line have been carefully considered by numerous legislative personnel.

Contrast the foregoing process with the procedure for ballot initiatives under Section 1(5.5). Citizen ballot initiatives go through no comparable political or professional process. Historically, anyone with money to hire enough signature gatherers could arguably get an initiative on the ballot. The small Blue Book

descriptions of proposed initiatives are nothing like the vetting process and deliberative analysis that all proposed statutes must undergo. This totally different process for ballot initiatives leaves the Colorado Supreme Court as the only state institution providing a meaningful review or check on efforts to enshrine particular values and projects into the Constitution via ballot initiative. The Supreme Court's sole tool for this review is Section 1(5.5)'s requirement for single subject and clear title.

Accordingly, this Court should not rely on Section 1(5.5) case law addressing ballot initiatives in determining this Section 21 challenge to a statute. Since there is no shortage of applicable Section 21 precedent, including the older Section 21 cases which remain good law, this Court should apply Section 21 case law to resolve the Plaintiffs' single-subject challenge.

2. The pertinent and controlling Section 21 cases are *Catron* and *House Bill No. 1353*.

Every single-subject case cited in Plaintiffs' summary judgment motion is a Section 1(5.5) case, except for *Catron* and *In re House Bill No. 1353*, 738 P.2d 371 (Colo. 1987). *See* Plaintiffs' motion at 27, 29. These are also the primary cases cited in CHA's motion for summary judgment because they are the most apposite, and provide a framework for single-subject analysis of statutes that confirms SB 17-267's constitutionality.

Plaintiffs offer *Catron* because it is the first Colorado case to describe in detail the legislative practice of "log rolling," which is commonly cited as a practice

that the constitutional single-subject requirement is designed to prevent. *See* Plaintiffs' motion at 27. However, Plaintiffs cite the "log rolling is bad" excerpt from *Catron* without fully reading the case. As explained in CHA's summary judgment motion, a close review of the entire case confirms that *Catron* actually held that although log rolling may be an undesirable feature of legislative practice, it is also an inevitable and unavoidable feature of legislative practice that cannot be prevented by Section 21's single-subject requirement. *Catron*, 33 P. at 513 ("Even a casual investigation into the methods a adopted by modern legislators will show that the passage of any bill upon its intrinsic merits is of rare occurrence, logrolling being as successfully carried on to secure the passage of a number of bills upon different subjects as if the same legislation could as formerly be included in a single bill. The constitutional provision, it is believed, however, does furnish a remedy for the other evils against which it is directed.").

The "other evils" that Section 21 does remedy are lack of notice and surprise. By requiring sufficiently broad titles, Section 21 insures legislators and the public are properly advised as to the contents of proposed legislation. *Id.* ("generality of a title is oftener to be commended than criticised"), citing *In re Breene,* 24 P. at 3-4 (emphasizing notice function of single-subject requirement, and approving of broader titles so voters and legislators are not surprised by "unknown and alien subjects which might be coiled up in the folds" of a bill). *See also* Plaintiff's motion at 31 (acknowledging that "a subject is not invalid simply because it is broad").

Thus, the actual holding of *Catron* relevant here is that any perceived log rolling in SB 17-267 may be undesirable but is not unconstitutional, and that the deliberately broad subject of "ensuring and perpetuating the sustainability of rural Colorado" is a proper and legitimate subject which notified legislators and the public of the scope of ingredients going into the legislative sausage.

Plaintiffs also offer *In re House Bill No. 1353* as a case striking down a statute for having too broad a subject. Plaintiffs' motion at 29. As discussed in CHA's summary judgment motion, *House Bill No. 1353* provides the applicable limiting principle for the breadth of bill subjects. The subject of House Bill no. 1353 was "Concerning an Increase in the Availability of Moneys to Fund Expenditure Priorities…." The bill addressed raising and spending money for the entire State, as though it were a general appropriations bill – but one that did not meet the separate constitutional requirements for appropriations bills. 738 P.2d at 371-72 and n.2; *see* Colorado Constitution Article V Section 32 (additional requirements for appropriations bills).

As explained in CHA's summary judgment motion, SB 17-267 is not as broad as a general appropriations bill. SB 17-267 creates specific legislative programs, fixes and strategies to sustain and perpetuate rural Colorado. SB 17-267 does this by, *inter alia*, tweaking some state-wide programs to focus more on rural Colorado, such as insuring that a minimum percentage of state highway funds addressed by the bill go to counties with populations of 50,000 or less. *See* SB 17-267, § 31.

In re House Bill No. 1353 is also relevant to this Court's analysis because it favorably cites the leading treatise on this matter, Sutherland's Statutory Construction. 738 P.2d at 372, citing Sutherland.[2] The Sutherland treatise concretely addresses the appropriate type of scrutiny applicable to determining whether a bill's provisions are sufficiently related to its subject. Sutherland emphasizes how legislatures can properly group seemingly disparate subjects into one bill without violating a state constitutional single-subject requirement, because the question is not whether all the provisions of a bill relate to each other, but whether they all relate to the bill's subject. The treatise also confirms that, when considering the relationship between a bill's subject and its provisions, courts do not require narrow tailoring (to analogize to equal protection scrutiny), but something more akin to the deferential rational relationship analysis:

> Where there is **any reasonable basis** for grouping various matter of the same nature together in one act, and the public cannot be deceived reasonably, the act does not violate the single subject requirement.

Sutherland § 17:2 at notes 4-6 (emphasis added).

This comment is important because it provides a modern context in which to construe the language of older, nineteenth century Section 21 cases like *Breene* and *Catron*. The older cases describe single-subject analysis in more abstract terms such as "disconnected or incongruous matters," *Breene*, 24 P. at 3; and "subjects having no necessary or proper connection" *Catron*, 33 P. at 514. That older

[2] The Colorado Supreme Court has cited to and relied on the Sutherland treatise in over a hundred cases.

terminology still prevails in Colorado because single-subject challenges to statutes (as opposed to ballot initiatives) are rare. *In re House Bill No. 1353*, 738 P.2d at 374 n.4. By reviewing similar cases interpreting similar constitutional single-subject cases from across the country, the Sutherland treatise distills a rule that judicial review of the required "fit" between a bill's subject and its provisions is essentially deferential – not unlike rational basis review in equal protection analysis. Sutherland, *supra* (courts accept "any reasonable basis" for grouping provisions of bill into one subject). This element of deference is proper: provisions of a bill that might seem "disconnected" or "incongruous" to laypersons, or even to lawyers and judges, might seem reasonably related to professional legislators based on their more nuanced understanding of the mechanisms of state law and administration. Because legislative expertise and power are at their zenith in matters such as taxes, raising revenue, expenditures and budgeting, courts take care not to substitute their own less-informed sense of what constitutes an adequate "fit" between a bill's subject matter and its provisions. Rather, courts defer to a legislature's perspective, and properly limit their inquiry to whether there is "any reasonable basis" for grouping the various issues addressed in a bill under a single subject. *Id.*

3. Every provision of SB 17-267 bears some reasonable relationship to rural Colorado.

Plaintiffs support their single-subject argument with overly general and facile descriptions of SB 17-267's provisions in an effort to characterize them as

unrelated to rural Colorado. *See* Plaintiffs' motion at 30. But that approach is contrary to the above discussed authorities.

While some of the bill's provisions may indeed have state-wide impact, the General Assembly took care to assure that each provision was crafted to provide some particular benefit for rural Colorado. For example, sections 12 and 31 of the bill address maintenance of roads throughout the state, but the bill recognizes that rural counties often get disproportionately less money for road maintenance than they should, and corrects that imbalance with its provision directing that 25% of funds raised through transportation bonds be spent in counties with populations of 50,000 or less. *Id.* That is an eminently reasonable way of addressing the needs of rural Colorado: rural roads have historically been given short shrift, so the General Assembly passed a bill that compensates for this historic omission.

The same analysis can be applied to the other provisions in SB 17-267. Because rural areas lack the population and resulting political clout of urban areas, they are perennially challenged in the legislative process. One reasonable way to fix that imbalance is to enact state-wide legislation that helps all Coloradans, including rural Coloradans in particular. The General Assembly's legislative solution to the problems of rural Colorado cannot be deemed unreasonable from a legislative perspective when it is accorded proper deference by a reviewing court. The statute may have state-wide application, but since its provisions do provide

some particular benefit to rural Colorado, the law is reasonably related to the bill's subject of sustaining and perpetuating rural Colorado.

In sum, in determining Plaintiffs' Section 21 single-subject challenge, this Court should not try to analogize to distinguishable Section 1(5.5) ballot initiative cases, but should rather base its review on more applicable Section 21 cases. Older but still vital cases like *Catron* hold that log rolling cannot be prevented, and that broad titles are good. *In re House Bill No. 1353* sets a limit on breadth (raising and spending money generally), but that limit is not implicated here. And by citing favorably to the Sutherland treatise, *In re House Bill No. 1353* provides a broader framework of single-subject case law that helps translate the nineteenth language of cases like *Catron* and *Breene* into a familiar contemporary approach to judicial scrutiny. Because SB 17-267 addresses economic issues, this Court should appropriately defer to the General Assembly's determination of the relationship between the bill's provisions and the subject of sustaining rural Colorado, and must uphold the bill if there is any reasonable basis for grouping the provisions under this heading. Because each provision of SB 17-267 does have some reasonable relation to rural Colorado, Plaintiffs' single subject challenge fails.

E. Establishing CHASE did not violate TABOR's revenue limiting provisions.

Plaintiffs' argument regarding the supposed requirement of reducing the TABOR excess revenue cap by $600 million fails because the CHASE HASF is not simply a continuation of the former hospital provider charge but is an entirely

distinct program. The General Assembly deliberately created CHASE as a new and different enterprise, rather than as the qualification of an existing government program. CHASE performs new and additional services apart from operating the now-extinguished CHCAA HPF (which has been replaced by the CHASE HASF). Because CHASE is not the qualification of an existing government program but is instead a new government-owned enterprise, no reduction to the Referendum C excess state revenue cap is required by TABOR or Referendum C, C.R.S. § 25.5-4-402. *See* C.R.S. § 25.5-4-402.4(3)(c)(I) (repealing and terminating the CHCAA HPF, and creating CHASE as a new enterprise with a distinct business model so the TABOR and Referendum C revenue limits would not be impacted).

The State Defendants have significant expertise regarding qualification and disqualification of enterprises, so CHA defers to and adopts the detailed arguments in the State Defendants' summary judgment motion (pages 30-35). CHA adds that in this area, like single-subject analysis, the Court should properly be mindful that:

- Plaintiffs must prove their position beyond a reasonable doubt. *Aspen*, *supra*.
- Courts must take the General Assembly at its word when reviewing its stated intent regarding termination of the hospital provider fee and creation of CHASE as a new enterprise. *St. Luke's Hospital*, *supra*.
- The economic nature of the issue requires a measure of deference in this Court's analysis. *See Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d at 12 (Colo. 1993) (describing the General Assembly's "characterization" of lottery proceeds in a bill as a "reasonable resolution" of tensions between TABOR and another constitutional amendment, and deferring to that legislative resolution).

- The General Assembly's powers are at their maximum regarding the State's budget, appropriations, and taxes. *Lamm*, *supra*; *Qwest*, *supra*.

IV. CONCLUSION

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

Dated: August 6, 2018.

POLSINELLI PC

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CERTIFICATE OF SERVICE

I certify that on August 6, 2018, the foregoing was served on all parties to this action via Colorado Courts E-Filing or by U.S. mail.

/s/ _____
Polsinelli PC