DATE FILED: August 6, 2018 12:43 PM
FILING ID: 9352B9DEA6D01
CASE NUMBER: 2015CV32305

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; KIM BIMESTEFER, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; COLORADO DEPARTMENT OF THE TREASURY; WALKER STAPLETON, in his official capacity as Colorado State Treasurer; and the STATE OF COLORADO;
Defendants,
and

COLORADO HOSPITAL ASSOCIATION
Defendant-Intervenor.

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PLAINTIFFS' RESPONSE TO STATE DEFENDANTS AND DEFENDANT-INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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Under Colorado Rule of Civil Procedure 56, Plaintiffs respond to the motions for summary judgment filed by Defendants and Defendant-Intervenor, respectively.

INTRODUCTION

On July 16, 2018, Defendants and Defendant-Intervenor moved for summary judgment. The Court should deny both motions because they fail to establish that Defendants and Defendant-Intervenor are entitled to judgment as a matter of law. Specifically, Defendants fail to (1) undermine Plaintiffs' standing, (2) establish that the charges at issue are fees and not taxes, (3) demonstrate that the state excess revenues cap need not be lowered, or (4) connect the disparate provisions of SB 17-267 to its stated single purpose. *See* State Defs.' Cross-Mot. for Summ. J. [hereinafter Defs.' Mot.]. Defendant-Intervenor's motion does not address multiple issues central to this case, does not meet the standard for summary judgement, and does little more than supplement and echo Defendants' arguments. *See* Colo. Hosp. Ass'n's Mot. for Summ. J. [hereinafter Def.-Int.'s Mot.].

Further, neither Defendants nor Defendant-Intervenor provide the Court with a statement of the undisputed facts upon which they rely. *Cf.* Pls.' Mot. for Summ. J. at 2–8 (enumerating undisputed facts with citations to the record and factual exhibits supporting each fact) [hereinafter Pls.' Mot.]. Instead, Defendants state generally that there "are no genuine issues of material fact requiring a trial" because the "structure of the Hospital Provider Fee and CHASE statutes themselves provide most of the framework necessary for the analysis" and because "[s]tate officials are presumed to act in good faith in discharging their official duties." Defs.' Mot. at 4 (citation omitted).[1] Defendants also claim that the "evidence supplied with [their]

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[1] Defendant-Intervenor takes a similar stance. *See* Def.-Int.'s Mot. at 1–2.

motion confirms that is the case." *Id.* Plaintiffs agree that most of the relevant facts are contained in public-record documents, including the statutes under review, and that this case is appropriate for disposition on summary judgment, as presented in their motion for summary judgment. But they deny that Defendants have provided sufficient evidence to support their motion for summary judgment. Defendants rely heavily on the affidavits of three Colorado government officials and one Colorado Healthcare Affordability and Sustainability Enterprise ("CHASE") board member. *See* Exs. A–D to Defs.' Mot. But other than the affidavit of Ms. Nancy Dolson, an employee of Defendant Department of Health Care Policy and Financing (the "Department"), the affidavits are not supported by factual exhibits and contain nothing more than conclusory, self-serving statements; they do not establish the material facts they purport to contain.[2] Summary judgment for Defendants and Defendant-Intervenor must be denied.

ARGUMENT

I. All Plaintiffs have standing.

The State Defendants argue that Plaintiffs do not have standing to maintain this suit. Defs.' Mot. at 4–8.[3] But Defendants have misconstrued the governing law. In fact, all Plaintiffs have suffered the cognizable injury necessary to maintain all the claims in their Second Amended and Supplemented Complaint.

Plaintiffs must establish the jurisdictional prerequisite of standing before a court will address their claims on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338

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[2] *See, e.g.*, Ex. B to Defs.' Mot. ¶ 32 (Aff. of Henry Sobanet) (claiming, without supporting evidence, that the "senior homestead exemption program . . . supports rural communities with greater aging populations and home values in those communities").

[3] Defendant-Intervenor does not address whether it disputes Plaintiffs' standing.

P.3d 1002, 1006 (Colo. 2014). The Colorado courts have recognized that "[t]here are at least three distinct forms of standing: taxpayer standing, individual standing, and organizational standing." *Barber v. Ritter*, 170 P.3d 763, 767 (Colo. App. 2007), *aff'd in part*, *rev'd in part on different grounds,* 196 P.3d 238 (Colo. 2008). In *Wimberly v. Ettenberg*, the Colorado Supreme Court established the current two-prong test: plaintiffs must establish that (1) they suffered an injury in fact, and (2) their injury was to a legally protected interest. 570 F.2d 535, 539 (Colo. 1977).[4] Plaintiffs meet the *Wimberly* test for all three distinct forms of standing.

A. The individual Plaintiffs have taxpayer standing; they also have suffered an economic injury.

1. The individual Plaintiffs have taxpayer standing.

In contrast to the narrow standing requirements on the federal level and those Defendants portray in their motion, the Colorado Supreme Court "has consistently permitted broad taxpayer standing." *Hickenlooper*, 338 P.3d at 1007. Taxpayers who raise constitutional challenges to allegedly unlawful state spending easily meet both prongs of the *Wimberly* two-part test. As the Colorado Supreme Court has explained, when "a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision . . . such an averment satisfies the [*Wimberly*] two-step standing analysis." *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008).

TABOR allows that "[i]ndividual or class action enforcement suits may be filed and shall have the highest civil priority of resolution." Colo. Const. art. X, § 20(1). If "the issues presented by [the plaintiffs] . . . concern the enforcement of [TABOR], the legally protected

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[4] *Wimberly* includes a third prong—whether the injury resulted from the alleged action of the defendant—that is not often carried forward in the jurisprudence and that is not disputed here. 570 P.2d at 539.

interest requirement of the *Wimberly* test is satisfied." *Barber*, 196 P.3d at 246 (citing *Nicholl v. E–470 Public Highway Authority*, 896 P.2d 859, 866 (Colo. 1995)). Injuries to other constitutional rights also have met this standard. *See, e.g.*, *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1376–77 (Colo. 1985) (infringement of legislature's constitutional prerogatives violated a legally protected interest).

For taxpayer standing in a suit alleging a constitutional violation, a plaintiff can meet the injury-in-fact prong of the *Wimberly* test by alleging "a generalized injury-in-fact: the 'injury flowing from governmental violations of constitutional provisions that specifically protect the legal interests involved.'" *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) (citing *Conrad v. City & Cty. of Denver*, 656 P.2d 662, 668 (Colo. 1982)). The protected legal interest includes state spending in conformity with the state constitution. Thus, when alleging a violation of the state constitution taxpayers satisfy the injury-in-fact prong "because they seek review of what they claim 'is an unlawful government expenditure which is contrary to our state government.'" *Barber*, 196 P.3d at 246–47 (citing *Nicholl*, 896 P.2d at 866).

Contrary to Defendants' position, a plaintiff is not required to allege an economic injury to establish taxpayer standing in a suit alleging a violation of the state constitution. *Nicholl*, 896 P.2d at 866 ("[E]ven where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution."); *see also Dodge v. Dep't of Soc. Servs.*, 600 P.2d 70, 71 (Colo. 1979) ("[I]njury in fact may be found in the absence of direct economic injury[.]"). Taxpayers have "standing because of [an] interest that the form of government under which [they] live[] be in accord with the state

constitution." *Id.* at 71 (citing *Colo. State Civil Serv. Emps. Ass'n v. Love*, 448 P.2d 624 (Colo. 1968); *Howard v. City of Boulder*, 290 P.2d 237 (Colo. 1955)).

These cases are contrasted with *Hickenlooper v. Freedom from Religion Foundation, Inc.* where the plaintiff lacked standing because "'there [was] no item in the State budget' relating to the issuance of the challenged proclamations and . . . there was 'no expenditure of public funds in [the] case.'" 338 P.3d at 1008 (quoting the district court). Similarly, in *Olson v. City of Golden*, the Court of Appeals held that plaintiff did not have standing because she did not allege the unlawful expenditure of funds or a constitutional violation. 53 P.3d 747 (Colo. App. 2002).

Here, it is undisputed that all Plaintiffs, including the individual Plaintiffs, have raised constitutional challenges to the lawfulness of state revenues and expenditures under TABOR, the single-subject requirement, and the state excess revenues cap. *See* Second Am. & Supplemented Compl. ¶¶ 86–141 (alleging violations of TABOR); *id.* ¶¶ 159–171 (alleging the state kept and spent monies in violation of TABOR cap); *id.* ¶¶ 172–185 (alleging the state violated the constitutional single-subject requirement in a bill that included spending provisions). It is also undisputed that the individual Plaintiffs are Colorado taxpayers. *Id.* ¶ 6 ("Ms. Sopkin is a Colorado taxpayer[.]"); *id.* ¶ 7 ("Mr. Rankin is a Colorado taxpayer[.]").

Plaintiffs further allege in their complaint and argue in their motion for summary judgment that the funds raised by the 2009 Hospital Provider Charge and 2017 Healthcare Charge are taxes and not fees because, among other things, the amounts raised far exceed that needed to defray the cost of services provided. *Id.* ¶ 41; Pls.' Mot. at 17–23. This mirrors the situation in *Barber*, where the Colorado Supreme Court held that plaintiffs had "taxpayer standing to challenge the constitutionality of" spending because the funds were allegedly used

for purposes other "than to defray the cost of services provided to those charged." 196 P.3d at 247. The individual Plaintiffs accordingly have standing in this case.

2. Defendants' challenge to the individual Plaintiffs' taxpayer standing is misplaced.

Defendants dispute that the individual Plaintiffs have taxpayer standing by arguing they lack a "clear nexus" between their status as taxpayers and the challenged government action. Defs.' Mot. at 4–8. This is so, Defendants claim, because the individual Plaintiffs were not direct payors of the Hospital Provider Charge (prior to 2017) or the Healthcare Charge (2017 to the present). Defendants' position is incorrect for the following reasons.

First, a "clear nexus" exists in this case because tax dollars, including those paid by the individual Plaintiffs, were appropriated to the Department to finance its administration of the charge and to fund the state Medicaid share contribution to the hospital provider charge cash fund. When the Department administered the program prior to 2017, the program was funded with money from at least three sources: the Hospital Provider Charge, federal funds, and state general appropriations. The individual Plaintiffs are Colorado taxpayers and thus contributed funds to that third source of revenue for the cash fund. Those funds were then comingled with funds from the other two sources and used to make program expenditures and pay administrative costs. Thus, a clear nexus exists between the individual Plaintiffs' status as taxpayers and the challenged government action. They therefore have standing to challenge the constitutionality of those expenditures.

Second, Defendants wrongly claim that the individual Plaintiffs cannot "show the remote possibility that the fee was passed onto them—because every hospital providing services to them has received more money back on the same day it paid the fee." Defs.' Mot. at 8. But that is

incorrect. As demonstrated in the following subsection, the individual Plaintiffs suffered an economic injury.

Third, the individual Plaintiffs have raised claims beyond challenging the lawfulness of the Hospital Provider Charge and Healthcare Charge as such. They raise constitutional claims under TABOR, the single-subject requirement, and the state excess revenues cap that involve the unconstitutional expenditure of state funds. Therefore, as explained above, they have taxpayer standing to maintain those claims regardless of whether they are direct payors of the two charges.

3. The Individual Plaintiffs have suffered an economic injury.

Even though it is not required to maintain this lawsuit, the individual Plaintiffs have suffered an economic injury in fact. "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." Second Am. & Supplemented Compl. ¶ 6. For example, Ms. Sopkin and her family received services at Lutheran Medical Center in May 2012. Ex. 1. May 2012 is in state fiscal year 2011–12. During that fiscal year, Lutheran Medical Center received $445,000 less than it paid in charges under the Hospital Provider Charge program. *See* Ex. 6 to Pls.' Mot. at B3 (detailing Lutheran Medical Center's losses). Because Lutheran Medical Center lost money in the program, it needed to recoup those losses from patients using private insurance, like Ms. Sopkin and her family. Defendant-Intervenor Colorado Hospital Association admits as much, stating, "some of the costs entailed in operating the provider fee may be subsumed in hospital bills generally (like any element of overhead)[.]" Def.-Int.'s Mot. at 3; *see also* Ex. 12 to Pls.' Mot. at 25–26 ("Hospitals neither pay the same charges nor receive the same supplemental payments. In practice, the

patients who pay the fees at hospitals that routinely pay more in fees than they receive in supplemental payments likely get fewer services than they pay for.”). Ms. Sopkin suffered an economic injury when she used services at Lutheran Medical Center and was required to pay for a portion of the losses it suffered because it was forced to pay the Hospital Provider Charge.

Mr. Rankin also suffered economic injury in fact. As averred in the Second Amended Complaint and left undisputed, 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.” Second Am. & Supplemented Compl. ¶ 7. Mr. Rankin received medical services at Good Samaritan Medical Center in October 2017. Ex. 2. October 2017 is in state fiscal year 2017–18. The CHASE Board annual report that will disclose hospital gains and losses for that fiscal year will not be published until January 2019. *See* Ex. 11 to Pls.’ Mot. at 6. Nevertheless, Good Samaritan Medical Center has lost money in every year that the Hospital Provider Charge program has been in existence, for a total loss of more than $30 million from FYs 2009–17, the second-highest losses of any hospital in the program. *See* Pls.’ Mot. at 15. Because the old Hospital Provider Charge and the new Healthcare Charge are the same in all relevant respects, *see id*. 34–35, it is reasonable to conclude that Good Samaritan Medical Center lost money during FY 2017–18, the year Mr. Rankin received medical services. Because Good Samaritan Medical Center lost money in the program, it needed to recoup those losses from patients using private insurance. Therefore, like Ms. Sopkin, Mr. Rankin suffered an economic injury when he used services at Good Samaritan Medical Center and was required to pay for a portion of the losses Good Samaritan Medical Center suffered because it paid the charges at issue in this case.

Additional evidence supports the conclusion that hospitals pass on the cost of the charge to privately insured and self-insured patients. First, if the General Assembly did not anticipate that hospitals would pass the charge along to patients, there would have been no reason to prevent them from listing the charge as a separate line item. *See* 2009 Colo. Sess. Laws 637 ("[H]ospital[s] shall not include any amount of the provider fee as a separate line item in its billing statements."); C.R.S. § 25.5-4-402.4(4)(f) (same, applied to CHASE charge). In other words, if hospitals were not expected to pass on the cost, the statutory prohibition is meaningless. Colorado courts, however, "strive to avoid statutory interpretations that render certain words or provisions superfluous or ineffective." *Kinder Morgan CO2 Co., L.P. v. Montezuma Cty. Bd. of Comm'rs*, 396 P.3d 657, 664 (Colo. 2017).

Second, if the General Assembly wanted to prevent hospitals from passing the costs of the two charges along to patients, it could have prevented them from doing so, as Arizona has done in its hospital provider charge program. *See* Ariz. Rev. Stat. § 36-2901.08(G) ("A hospital shall not pass the cost of the assessment on to patients or third-party payors that are liable to pay for care on a patient's behalf."). The Colorado General Assembly chose not to make that choice, thus freeing the hospitals to recoup their losses through higher bills or lower quality service. *See* Ex. 12 to Pls.' Mot. at 24 ("[P]atients who pay for care at hospitals that consistently lose money get less than they pay for. The money must come from somewhere, either in higher charges for patients or a lower intensity of care.").

Third, in 2015, a bill was introduced in the House to remove the statutory prohibition against disclosing charges in patients' bills. *See* HB 15-1141 (a bill to remove the statutory prohibition against including the amount of the "Hospital Provider Fee" on patient billing

statements); *Hearing on H.B. 15-1141 Before the H. Comm. On Health, Insurance, & Environment*, 70th Sess. (Feb. 12, 2015) (indicating the purpose of the proposed bill was to improve "transparency"). If hospitals were not in fact passing along the charge to patients, there would have been no need to introduce such a bill to increase transparency.

Fourth, in addition to these structural and legal arguments, basic economics teaches that entities pass along charges such as sales and excise taxes to their customers, especially when the demand for the good or service is inelastic. *See* Ex. 12 to Pls.' Mot. at 26 (discussing how "[a]lmost everyone recognizes that most of the burden of [a sales] tax is borne by the consumers who buy the groceries, even though it is the grocer that sends the money to the state treasury"); Alex Brill, *Taxing the Sick: How "Fees" in Health Care Reform Hurt Patients*, AEI Tax Policy Outlook, 2009, No. 2 (Oct. 2009); Jane G. Gravelle and Sean Lowry, *The Medical Device Excise Tax: Economic Analysis*, Congressional Research Service, 12–20 (April 17, 2015) (concluding that medical device tax imposed on manufacturers by the Affordable Care Act will be passed on to consumers because of the inelastic demand for medical devices).

In summary, the individual Plaintiffs have taxpayer standing because they are taxpayers and have alleged a constitutional violation that has resulted in the unlawful expenditure of money. Even though it is not required in this case, they also have established that they suffered an economic injury by having private insurance and obtaining medical services at hospitals that lost money in the Hospital Provider/Healthcare Charge program.

B. The TABOR Foundation and Colorado Union of Taxpayers Foundation have associational standing.

The Colorado Supreme Court has outlined the test an association must meet to establish standing on behalf of its members. The court held an organization has associational standing

when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members of the lawsuit." *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 510 (Colo. 2018). The TABOR Foundation and Colorado Union of Taxpayers Foundation ("CUT Foundation") meet that test.

First, members of each association would have standing to bring this case in their own right. As outlined above, Ms. Sopkin has both taxpayer standing and has suffered an economic injury; she is a member of the TABOR Foundation. Second Am. & Supplemented Compl. ¶ 6. In addition, in response to interrogatories, the CUT Foundation disclosed that Mr. Kaarl Hoopes is a Colorado taxpayer, member of the organization, and received services at Lutheran Medical Center in 2015, a year in which the hospital lost more than $5.6 million in the Hospital Provider Charge program. *See* Pls.' Resp. to Defs.' First Set of Interrog. at 6; Ex. 10 to Pls.' Mot. at B3. Additionally, even if the Court were to find that Ms. Sopkin and Mr. Hoopes cannot challenge the charges at issue because they did not directly pay them, Plaintiffs' claims alleging violations of the single-subject requirement and the state excess revenues cap would remain. Thus both associations can maintain those claims on behalf of their members.

Next, the TABOR Foundation and CUT Foundation both meet the second prong of the test because the interests this lawsuit seeks to protect are germane to their purposes. The TABOR Foundation "is dedicated to protecting and enforcing TABOR on behalf of its members . . . [and it has] 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." Second Am. & Supplemented Compl. ¶ 4. Similarly, the CUT Foundation

"educate[s] the public as to the dangers of excessive taxation, regulation, and government spending. [It] is dedicated to the proper interpretation and implementation of TABOR . . . [and it has] 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." *Id.* ¶ 5; *see City of Aspen*, 418 P.3d at 511 (recognizing the CUT Foundation's associational standing in a TABOR case).

Finally, lawsuits to remedy constitutional violations do not require the participation of an association's individual members. *City of Aspen*, 418 P.3d at 511 (citing *Warth v. Seldin* 422 U.S. 490, 515 (1975) (recognizing the need for individual members to participate in a suit when individualized damages claims are presented)).

* * * *

To summarize, the individual Plaintiffs have established taxpayer standing to maintain the claims in the Second Amended and Supplemented Complaint because they have alleged constitutional violations of the state's taxing and spending authority. Even though it is not required in this case, they also have suffered an economic injury because they received services from hospitals that were net losers in the Hospital Provider Charge program. The two Foundations have associational standing because at least one of their members could sue in their own right, this suit is germane to their purposes, and the presence of the individual members in the suit is not required. Standing is thus established for all Plaintiffs on all claims.

II. Both charges at issue in this case are taxes.

Plaintiffs' lead argument on the merits is that both the 2009 Hospital Provider Charge and the 2017 Healthcare Charge are taxes levied in violation of TABOR. Pls.' Mot. at 13–26. This

is so, Plaintiffs argue, because the charges do not fund a fee-for-service transaction and the size of the charge is not reasonably related to defraying the cost of providing the services rendered. In their motion for summary judgment, Defendants argue the charges at issue are fees because of legislative intent, of the use of fee nomenclature, and the purpose of the enaction was to provide a service and benefit to the charge-paying hospitals. Defs.' Mot. at 8–27.

A. Defendants assert the wrong standard by improperly focusing on the benefits provided to the hospitals instead of the costs incurred by the government to provide the service, tempting the Court into error.

In arguing that the Hospital Provider Charge is not a tax, Defendants' place a great deal of emphasis on the expressions made by the General Assembly and the labels it placed on various provisions. Defs.' Mot. at 8–16. Plaintiffs do not dispute that the General Assembly cloaked its evasion of TABOR's requirements in legislative text parroting established case law. Both Parties agree, however, that these formalities are not dispositive and that the Court must look at the substance of the program. *See* Defs.' Mot. at 10; Pls.' Mot. at 38; *see also City of Aspen*, 418 P.3d at 514. (Because the government may "attempt[] to circumvent TABOR's requirements by pretending that a tax is, in fact, not a tax, . . . [a court must] focus [its] core inquiry on the practical realities of the charge's operation[.]").

Turning to the substance, Defendants attempt to argue that the charge is a fee rather than a tax because it was used to defray the cost of services provided to the charge payers. Defs.' Mot. at 16–23. But in making its argument, Defendants misapply the relevant law by focusing almost exclusively on whether the charge was used *to provide a benefit* to the hospitals. *See id.* 16–22 (explaining program benefits to hospitals). That, however, is not the legal test. The case law teaches instead that a charge may be considered a fee only if it is used to *defray the*

government's cost to provide the service and is *reasonably related* to that cost. *See* Pls.' Mot. at 17–23; *City of Aspen*, 418 P.3d at 514 (collecting cases where fees "defrayed" government costs).

Although Defendants give lip service to the correct standard by making a conclusory statement that "[t]he primary purpose of the Hospital Provider Fee *is to defray costs* of that program," Defs.' Mot. at 23 (emphasis added), their argument relies solely on the benefit to the hospital industry as a whole. *Id*. at 22 ("Here, the *value provided to hospitals* vastly outweighs the amount that they are required to pay in fees. . . . [H]ospitals paid $669.50 million in fees and received $1,686.68 million *in direct benefits*."); *id*. at 23 ("The amount . . . hospitals pay in fees is a fraction of *the value provided to them* in return.") (emphasis added throughout).

Defendants only mention "the cost of administering the Hospital Provider Fee program" in passing and make no attempt to quantify those costs or argue that they are reasonably related to the charge. *Id*. at 22. But that is the relevant test and question presented. *City of Aspen*, 418 P.3d at 514. The pages Defendants devote to the wrong test is a virtual admission that the scheme fails the proper legal standard under Colorado precedent.

Plaintiffs do not dispute that the Hospital Provider/Healthcare Charge program has provided a benefit to many (but not all) hospitals; why else would an association representing the industry intervene in this case in support of paying the charge? But the benefit received by some hospitals is not the relevant question presented. The Colorado Supreme Court has unequivocally stated that whether a charge is a tax or a fee depends on whether the charge is reasonably related to the *costs* of providing the service in question. *City of Aspen*, 418 P.3d at 514 (collecting cases where fees "defrayed" government costs); *see also* Pls.' Mot. at 19 (discussing direct and indirect costs incurred by the governmental entity providing the service).

Defendants ignore the many Colorado Supreme Court cases on point and instead misapply a decision from the Court of Appeals. Defendants claim that "to be a fee, a charge must be reasonably related to the overall cost of providing the service and must be imposed on those who are reasonably likely to benefit from or use the service." Defs.' Mot. at 22 (citing *Colo. Bridge Enter.*, 2014 COA 106 ¶ 35). Leaving aside that this text demands a focus on "the overall cost of providing the service," which Defendants never address, the cited passage from *Colorado Bridge Enterprise* does not discuss or even mention the concept of benefit. Its focus is solely on whether the charge defrays the costs of services provided to those charged:

> The third factor is whether the primary purpose of the charge is to finance or defray the cost of services provided to those who must pay it. *See Barber*, 196 P.3d at 241, 249 (a charge is a fee when the primary purpose is to "defray the costs of services provided to those charged" or to "finance a particular service utilized by those who must pay the charge").

Defendants provide no authority for the proposition that the reasonableness of a charge is to be assessed in relation to the benefit received by those who pay the charge. Plaintiffs, by contrast, provided the Court with citations to the relevant case law, described the services provided to the hospitals in this case, and showed that the amounts raised by the charges levied and the costs incurred by the government entities providing the service are grossly unreasonable. Pls.' Mot. at 17–23. Indeed, the charge levied is *twenty-one times* larger than the costs incurred. *Id*. at 20. The charge is a tax, not a fee.

B. Going from bad to worse: CHASE provides even less service to hospitals under the Healthcare Charge than the Department did when it administered the Hospital Provider Charge.

Defendants claim that the Healthcare Charge levied by CHASE beginning in 2017 is a fee and not a tax. Defs.' Mot. at 23–25. However, the same test applicable to the Hospital

Provider Charge applies to the CHASE-administered Healthcare Charge. The latter can be a fee only if CHASE provides a service to the hospitals and the charge is reasonably related to CHASE's cost of providing that service. Even Defendants acknowledge "that the revenue raised from the [Healthcare Charge] can only be spent in support of [CHASE] and the *services it provides* to fee-paying hospitals." *Id.* at 24 (citing C.R.S. § 25.5-4-402.4(4)) (emphasis added). But CHASE does not provide any real service beyond what the Department provided, and thus the charge it levies must be considered a tax for the same reasons the Hospital Provider Charge is a tax. Pls.' Mot. at 24–25. Moreover, the Healthcare Charge is even more unreasonable in relation to cost because CHASE, by itself, provides even less of a service than the Department because it does not actually make the supplemental payments to hospitals—allegedly, one of its primary business services.

In 2017, the General Assembly transferred the authority to collect the charge from the Department to CHASE. In doing so, it maintained that the primary purpose for the charge was to provide supplemental payments to hospitals treating low-income and uninsured populations. SB 17-267 § 17. Or as CHASE Board Member Burnett said, the service is the "collections of fees and then draw down of the [federal] match and then distribution of the supplemental payments" to the hospitals. Ex. 3 (Burnett Dep. at 62:9-11). Burnett also stated that although CHASE is supposed to provide consulting services, the "primary business service" is the "collection of fees and distribution of supplemental payments." *Id.* at 64:3–6. However, upon careful examination, the evidence shows that CHASE does not actually make any payments distributing supplemental

payments to hospitals.[5] Instead, CHASE is simply the funding mechanism for the Department's ongoing administration of the pre-existing program.

Although CHASE's stated purpose is to provide actual payments to hospitals, the General Assembly is removing funds from the CHASE cash fund and appropriating them to the Department on an annual basis, and it is the Department that pays the hospitals through its normal Medicaid reimbursement payment system. The mechanism is established in the final section of SB 17-267, which restructures the source of appropriations for the Department. Prior to SB 17-267, the Department's "hospital provider fee cash fund" provided a source for the Department's expenditures for the program, including administrative costs and supplemental payments. *See* Pls.' Mot. at 19–22 (discussing Department expenditures). But because SB 17-267 established CHASE with its own cash fund, the General Assembly had two choices. Either CHASE could make the same expenditures that the Department had previously made, or the funds could be transferred out of CHASE and back into the Department, which would then continue to make the same expenditures that it had been making, including supplemental

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[5] Exhibit 6 is the first page of a lengthy document that purports to demonstrate CHASE payments to hospitals. However, it provides no such proof. It is impossible to glean any information from this document regarding the source or recipient of cash without additional information describing the transactions (such as the underlying journal entries, which in double-entry bookkeeping would provide the complete transaction) and without an explanation of the column headings and access to the source documents that appear to be referenced in the first few columns. This report also includes no information regarding the nature of this account and no information regarding the balance, if any, in this account at the time the report was run. All that can be inferred from this report is that cash appears to go into and out of the account simultaneously without explanation of where it came from or where it went; and without an explanation of why every inflow or outflow is immediately matched by the opposite flow of cash. In short, this document raises more questions than it answers and does not prove CHASE directly paid hospitals.

payments to the hospitals. It appears the General Assembly chose the latter and when it did so, undermined the requisite operational independence for CHASE to be an enterprise.

SB 17-267 provides that for "[FY] 2017–18, $861,416,161 is appropriated *to the department* of health care policy and financing. This appropriation is *from the healthcare affordability and sustainability fee cash fund* created in section 25.5-4-402.4 (5)[.]" SB 17-267 § 32 (emphases added). That is, the Department received a $861 million appropriation sourced from the CHASE cash fund. The act also made "all money in the [CHASE] fund . . . *continuously appropriated to the enterprise*" for the purposes specified in the statute, including supplemental payments to hospitals. *Id.* § 17 (emphasis added). But that continuous appropriation did not last. Less than one year later, the General Assembly passed a one paragraph bill that ended the continuous appropriation and provided that all money in the CHASE cash fund is now "subject to annual appropriation by the General Assembly[.]" *See* SB 18-195 § 1; C.R.S. § 25.5-4-402.4(5)(b) (reflecting funds now subject to annual appropriation). Less than one hour after signing that bill into law, the Governor signed the FY 2018–19 appropriations long bill, raiding the CHASE cash fund again and redirecting its funds to the Department. *See* Ex. 4 (HB 18-1322, the FY 2018–19 Long Appropriations Bill).

The FY 2018–19 long bill made nineteen separate appropriations to the Department that were drawn from the CHASE cash fund, including two very large appropriations to fund $692 million in Medicaid payments and $155 million for indigent care. *See id.* at 61, 63. In addition to these large items, the appropriations also were directed to numerous administrative expenses—not coincidently, the exact same administrative expenses the Department previously reported as being used to fund and operate the Hospitals Provider Charge program. For example,

for FY 2015–16, the Department reported administrative expenditures for general professional services and special projects, Medicaid Management Information System maintenance, Colorado Benefits Management System, medical identification cards, special eligibility determinations, customer outreach, professional audit contracts, indirect cost assessment and recovery, and Children's Basic Health Plan administration. *See* Ex. 10 to Pls.' Mot. at 14–15. These administrative expenditures all have analogs in the FY 2018–19 long bill, where the money is appropriated to the Department and sourced from the CHASE cash fund. *E.g.*, *compare id.* at 15, *with* Ex. 4 at 59 (administrative expenditures for customer outreach).

This appropriation of monies out of the CHASE cash fund and to the Department contrasts with how appropriations are handled for other enterprises. For example, in the FY 2018–19 long bill, the General Assembly appropriated $116 million "from the Statewide Bridge Enterprise Special Revenue Fund" to the Statewide Bridge Enterprise, but the "funds are subject to allocation by the Statewide Bridge Enterprise Board . . . [and] are included [in the long bill] for informational purposes only." Ex. 4 at 258; *see also id.* at 257 (same, applied to High Performance Transportation Enterprise and subject to allocation by its board). None of the nineteen separate appropriations from the CHASE cash fund are appropriated to CHASE and none are subject to allocation by its board; they are instead appropriated to the Department for its expenditures. *See, e.g.*, *id.* at 64.

Thus, according to the appropriations figures, the Department is continuing to perform the same administrative and programmatic tasks—including making supplemental payments to hospitals—that it was performing before CHASE was created and allegedly took over the

program. And, to fund those tasks, the General Assembly is appropriating the funds out of the CHASE cash fund and giving it to the Department.

This raises an important question: if the Department is the entity actually running the program, incurring administrative expenses, and making supplemental payments to hospitals, what services does CHASE provide to hospitals? It appears it does little more than calculate and collect the Healthcare Charge, comingle the funds with federal matching funds, and then hand over the combined funds to the Department so that it, the Department, can pay administrative expenses and disburse supplemental payments to hospitals. This structure undermines any claim that CHASE is providing the "primary business service," as CHASE Board Member Burnette called it; instead, *the Department* is providing that service.[6]

This arrangement violates the essential operational independence that a TABOR-exempt enterprise must enjoy. Defendants rely on *Colorado Bridge Enterprise* to claim that CHASE is an enterprise. Defs.' Mot. at 23–25. But the evidence described above shows that CHASE lacks the operational independence the court found in that case. In *Colorado Bridge Enterprise*, the Court of Appeals found it crucial that "[a]lthough [the enterprise] is within [a state department]" it is still an enterprise because "the two have separate financial accounting and reporting systems

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[6] This analysis contradicts three affidavits submitted by Defendants. *See* Ex. A to Defs.' Mot. at ¶ 4 (Department staffer Dolson stating that "CHASE . . . provides various business services to Colorado hospitals, including . . . calculating supplemental payments and *remitting those payments back to the hospitals*."); Ex. C to *id*. at ¶ 11 (Department Deputy Controller Cotosman stating that "[o]ther than transfers to the Department's General Fund to offset the loss of certified public expenditures, . . . or as otherwise authorized by statute . . . , *no funds have been transferred from the CHASE Cash Fund to the General Fund or any other fund*."); Ex. D to *id*. at ¶ 14 (CHASE Board Member Burnett stating that the "CHASE board operates the CHASE Fee program by collecting provider fees from hospitals and drawing down federal funds, *which it remits back to the hospitals in the form of supplemental payments*.").

and maintain separate financial administration." *Tabor Found. v. Colorado Bridge Enter.*, 353 P.3d 896, 899 (Colo. App. 2014). It was also relevant that "[t]he General Assembly retained no authority to spend [enterprise] funds; instead, all [enterprise] revenues are spent under the exclusive authority of the [enterprise's board]." *Id*. The Court of Appeals also relied on "evidence that the [enterprise] and [department] had separate treasury accounts and that money from the [charge in question] never passed into or through the [department] account or the state's general fund." *Id*. at 902.

The relationship between CHASE and the Department, by contrast, lacks all those elements. CHASE has reported the Department's expenses. *See* Ex. 11 to Pls.' Mot. at A14. The General Assembly has reclaimed the right to appropriate funds out of the CHASE cash fund and has done so for both fiscal years CHASE has existed. *See* SB 17-267; SB 18-195. And the money from the Healthcare Charge passes into and through the Department's accounts to fund administrative expenses and hospital payments. *See* Ex. 4.

Therefore, because CHASE is not providing the primary business service and lacks the necessary operational independence, it is not providing a fee-for-service, which means the Healthcare Charge is a tax and not a fee.

C. It would not cripple government services if the Court concludes that the charges at issue here are taxes.

Defendants complain that to enforce TABOR's requirements in this case would cripple the state budget. *See* Defs.' Mot. at 3–4. But, in doing so, they improperly focus on the remedy for the TABOR violations that occurred in this case rather than on the interpretation of TABOR's substantive provisions, which is where temperance is required.

TABOR contains an internal rule of construction that states the preferred interpretation of TABOR's provisions is the one that would "reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). Beginning in *Bolt*, the Colorado Supreme Court "decline[d] to adopt a rigid interpretation of [TABOR's voter-approval requirement], which would have the effect of working a reduction in government services." *Bolt v. Arapahoe Cty. Sch. Dist. No. Six*, 898 P.2d 525, 537 (Colo. 1995). The court reached that conclusion because all the charge in that case was designed to do was "recoup lost revenue that, but for the assessor's errors, would have been collected from the property owners." *Id*. Then, in *In re House Bill 99-1325*, the Colorado Supreme Court declined to require voter approval when it would "lead to absurd results because not only would it cripple the everyday workings of government, but also, in some cases, the cost of the election could exceed the" amount of revenue raised. 979 P.2d 549, 557 (Colo. 1999). The court combined and reformulated those two decisions in *Barber* to produce a check on reading TABOR in a way "that would hinder basic government functions or cripple the government's ability to provide services." *Barber*, 196 P.3d at 248 (citation omitted); *see also City of Aspen*, 418 P.3d at 512 (applying *Barber* formulation).

A hypothetical example shows the folly in Defendants' position. Imagine the situation where the General Assembly violates TABOR in an obvious, egregious fashion, where no interpretation of TABOR's provisions is required to reach that conclusion. If a lawsuit was filed and it took a couple years before the lawsuit reached a judgment, the state could well have levied an enormous amount of illicit revenue from the unconstitutional tax and the people would be due a large refund. It would be of no moment for the state to argue at that juncture that to apply TABOR as written would cripple the state budget. If that were a valid argument, TABOR would

have no meaning at all when the most egregious and obvious violations occur. Instead, it is only where a court is weighing between two equally plausible interpretations concerning TABOR's application that the question of "crippling government services" is considered. The question of the appropriate remedy in the event of a violation comes later.

Additionally, the *Barber* limitation focuses on whether an interpretation would "cripple the government's ability to provide services" because the government would be unable to provide those services in another valid manner. *Barber*, 196 P.3d at 248. That is not the case here. A finding that the Hospital Provider Charge and Healthcare Charge are taxes will not prevent the state from levying them; it simply will require it to obtain voter approval before doing so. There is nothing inherent in the structure or method of either tax that would prevent the state from collecting them. But the state must follow the constitutional path to do so.

* * * *

Defendants have not shown that the size of the charges at issue are reasonably related to the cost of providing services or that CHASE is even providing the primary service in question. The Hospital Provider Charge and Healthcare Charge accordingly are taxes, not fees, and they violate TABOR because they were levied without a vote of the people. Defendants' motion for summary judgment must be denied.

III. The General Assembly was required to reduce the state excess revenues cap because the 2009 Hospital Provider Charge was subject to the cap and the 2017 Healthcare Charge is a continuation of that charge.

Plaintiffs allege and argue that the General Assembly was required to reduce the state excess revenues cap by the full amount the Hospital Provider Charge was projected to raise in FY 2017–18 when the General Assembly created CHASE and empowered it to levy the

Healthcare Charge. Second Am. & Supplemented Compl. ¶¶ 159–71; Pls.' Mot. at 33–40. This is so for two reasons: first, the revenue raised by the charge was subject to the cap when it was levied by the Department, and second, the 2009 Hospital Provider Charge and 2017 Healthcare Charge are the same in all meaningful respects. The General Assembly violated the requirement to lower the cap because it lowered it by only $200 million rather than the full $600.6 million the charge was projected to raise.

Defendants claim that no adjustment to the cap was necessary because (1) the creation of CHASE was not the "qualification" of a TABOR-exempt enterprise, and (2) the revenue raised by the Hospital Provider Charge was not used to calculate the level at which the cap was initially set.[7] Defs.' Mot. at 30–35. Defendants' first argument is incorrect and its second is irrelevant.

A. The "qualification" of an enterprise occurs when it meets the constitutional definition of an enterprise and it is given the authority to collect a revenue stream that was previously subject to the cap.

The Parties agree that the phrase "qualification or disqualification" of TABOR enterprises is neither defined in the constitution nor has it been interpreted by the courts. Defs.' Mot. at 31. So, both sides are arguing from first principles, and this Court is in the position to provide the first interpretation.

Plaintiffs argue that, in the context presented here, the "qualification" of a TABOR-exempt enterprise occurs whenever (1) an entity meets the constitutional definition of an enterprise, Colo. Const. art. X, § 20(7)(d), and (2) that entity gains authority to collect a revenue stream that was previously subject to the state excess revenues cap. Pls.' Mot. at 33. Assuming the constitutional requirements of an enterprise are met, a qualification of that enterprise occurs,

[7] Defendant-Intervenor echoes Defendants' first argument. Def.-Int.'s Mot. at 12–14.

and thus a lowering of the cap is triggered, whenever the two revenue streams at issue are the same in all meaningful respects. *Id*. at 33–35. For example, when the two revenue streams are drawn from the same class of persons or businesses, in the same general amounts, for the same purposes, and subject to the same limitations, as is the case with the Hospital Provider Charge and the Healthcare Charge. On this point, Plaintiffs urge a real world, substantive look at the similarities of the two revenue streams in question, not a formalistic labels-based approach.

Defendants propose that a "qualification" can happen in one of two ways, neither of which they contend occurred here. First, an existing, already-qualified enterprise can become disqualified by failing to meet one of the constitutional definition's requirements and then it can "requalify" by remedying that failure, as in the example of Fort Lewis College. Defs.' Mot. at 31. But that example provides no clarity on when a "qualification" occurs in the first instance, only a "requalification," which is not a term that appears in TABOR. Colo. Const. art. X, § 20(7)(d) ("Qualification or disqualification as an enterprise shall change district bases and future year limits.").

Second, Defendants propose that a "qualification" occurs, and therefore a reduction of the cap is required, only when the General Assembly explicitly concedes that it is transferring to an enterprise a revenue stream that was used to calculate the original state excess revenues cap. Defendants provide the example of the 2009 conversion of a section within the Department of Unemployment Insurance into an enterprise. Defs.' Mot. at 34. Defendants claim the cap was lowered as a result of that "qualification," whereas the decision not to do so with CHASE "reflects the General Assembly's recognition, whether or not stated in the bill, that this situation

is different." *Id*. But that conclusion is nothing more than speculation, as it is not supported by the text of the bill that created the unemployment insurance enterprise.

Indeed, Defendants' interpretation of the Department of Unemployment Insurance example is untenable because there is no discussion in the bill about the "qualification" of a new enterprise or a reduction in the state excess revenues cap. *See* 2009 Colo. Sess. Laws 1876–1911. The terms "qualification" and "state excess revenues cap" do not even appear in the bill, nor does a citation to C.R.S. § 24-77-103.6 where the cap is codified. In relevant part, the bill merely provides that "the Unemployment Compensation Section of the Division shall constitute an enterprise for purposes of" TABOR. *Id*. at 1876. As such, there is no explicit legislative recognition that a "qualification" has occurred and that a reduction in the cap is mandated. *But cf*. SB 17-267 § 11 (explicitly lowering the cap by $200 million).

In addition to the lack of an express legislative recognition of "qualification," the substance of the conversion of a section within the Department of Unemployment Insurance mirrors what occurred in this case, lending support to Plaintiffs' position. In both instances the revenue stream at issue was subject to the cap before the enterprise was created and the two revenue streams before and after the creation of the enterprise were the same in all meaningful respects. There are only two differences, neither of which is relevant. The first is that the revenue stream for the Department of Unemployment Insurance was used in setting the cap's initial level. But that distinction is irrelevant, as Plaintiffs discuss below. *See infra* § III.B. Second, the General Assembly did not try to obfuscate its evasion of the cap by purporting to end one revenue stream and then simultaneously recreating the same revenue stream within an enterprise. It simply created the enterprise with the authority to collect the revenue stream. *See*

2009 Colo. Sess. Laws 1876 § 1. To rely on that "distinction" in this case would, again, amount to an improper elevation of form over substance because the revenue streams before and after the creation of CHASE are identical.

Further, the position Defendants have staked out is untenable when applied to this case. They argue that when "CHASE was created in 2017; it did not 'qualify' as an enterprise at that time." Defs.' Mot. at 30. If that is true, then when, under Defendants' view, did CHASE "qualify" as an enterprise? Defendants' position requires them to respond "never," because otherwise an adjustment to the cap would have been triggered whenever that "qualification" occurred. But Defendants also argue that an "enterprise qualifying or disqualifying . . . by convention has referred to whether the enterprise met the qualifications laid out in the constitution." Defs.' Mot. at 32. In that respect, Defendants are forced to concede that "qualification" must have occurred because for CHASE to survive judicial review and remain in operation as an enterprise, it must meet "the qualifications laid out in the constitution." *Id.* Defendants' position, in other words, requires them to maintain the contradictory position that there was a "qualification" of CHASE as an enterprise under the constitutional definition, but no "qualification" triggering an adjustment to the cap.[8]

Plaintiffs' interpretation provides a sound and reasoned solution to the quandary. There was a "qualification" of CHASE as an enterprise in 2017 when, at its creation, it met the constitutional definition of an enterprise and was given the authority to collect a revenue stream

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[8] *See* Aristotle, Metaphysics, Book IV, pt. 3 (350 BC), *available at* http://bit.ly/2kEdTpp ("[T]he most certain of all principles" is that "it is impossible for anyone to believe the same thing to be and not to be" because "it is impossible that contrary attributes should belong at the same time to the same subject[.]").

that was previously subject to the revenues cap.[9] Plaintiffs' interpretation harmonizes two TABOR provisions that otherwise are in tension. When an enterprise is qualified, a reduction in the cap is demanded. Colo. Const. art. X, § 20(7)(d). But revenue raised by enterprises is also exempt from the cap. *Id*. § 20(2)(b). Plaintiffs' construction allows both provisions to remain operative. When a valid enterprise, either new or existing, is given the authority to collect a revenue stream that had previously been subject to the cap, a reduction in the cap is demanded; that is a "qualification" within the meaning of the Colorado Constitution. But once the required, one-time reduction in the cap has occurred, the enterprise continues to operate and collect revenue, which can rise above its original level without implicating TABOR or the cap. Thus, both provisions, "qualification" and the exemption, are given effect.

Defendants are unable to provide a similarly cohesive interpretation. They have argued that an enterprise can be created without "qualifying" but that the same enterprise is "qualified" whenever it meets the constitutional requirements. As applied to CHASE, Defendants' argument is that it was qualified when it was created because it met the constitutional requirements, but that it was not qualified for purposes of reducing the state excess revenues cap. The Court should reject that incoherent position.

Defendants and Defendant-Intervenor both rely heavily on the labels the General Assembly used when it created CHASE. For example, Defendants argue that "Plaintiffs have no authority for the proposition that the General Assembly does not have the plenary power to end one program and create a different one." Defs.' Mot. at 32. That misconstrues Plaintiffs'

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[9] This is true only if the Court finds that the Healthcare Charge is a fee and not a tax. CHASE cannot qualify as a TABOR-exempt enterprise if it is levying a tax. Pls.' Mot. at 25–26.

argument. Of course Plaintiffs agree that the General Assembly has plenary power to legislate on state programs, but Defendants similarly must agree that that power is not absolute. The choices the General Assembly makes when it starts and ends programs have consequences and are subject to the constraints in the Colorado and U.S. Constitutions. The General Assembly, for example, may not create an enterprise to levy and administer a tax, which Plaintiffs argue was done in this case. To the extent the Court considers the Healthcare Charge a fee, the creation of CHASE nevertheless carries with it the obligation to adhere to TABOR's requirement that the excess state revenues cap be lowered. It is not a question of whether the General Assembly has plenary power, but one of the limits and constraints on that power, which this Court must enforce. *See* Pls.' Mot. at 38 ("Although this Court may consider labels the General Assembly places on legislative provisions, it has an independent duty to examine the substance behind those labels.") (citing *Mosko v. Dunbar*, 309 P.2d 581, 594 (Colo. 1957); *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *see also Acco Brands, Inc. v. PC Guardian Anti-Theft Prod., Inc.*, No. 04-3526, 2008 WL 753899, at *4 n.2 (N.D. Cal. Mar. 19, 2008) (recounting the story of President Lincoln "explaining that calling a sheep's tail a leg does not make it so").

B. It is irrelevant whether the revenue raised by the Hospital Provider Charge was used in *calculating* the cap, it only matters whether it was *subject* to the cap before CHASE was given the authority to collect it.

Plaintiffs contend that a reduction in the state excess revenues cap is required whenever a revenue stream *subject to the cap* is transferred to an enterprise. Pls.' Mot. at 33. No other interpretation gives effect to the TABOR provision that "[q]ualification or disqualification as an enterprise shall change district bases and future year limits." Colo. Const. art. X, § 20(7)(d). Defendants contend that a lowering of the cap is necessary only if the revenue stream in question

was used in *calculating the cap* during the five-year time-out period following the passage of Referendum C. Defs.' Mot. at 33–35. Defendants' argument is untenable and would allow the growth of government that TABOR and the state excess revenues cap were intended to prevent.

The purpose of the excess state revenues cap is to establish a ceiling on the amount of money the state can extract from the private sector. The cap also is meant to give the General Assembly flexibility below that ceiling to design revenue-raising measures from a variety of sources of its choosing. The year-to-year restructuring of the variety and volume of the individual revenue streams is the *raison d'être* of legislative budgeting. TABOR provides that one of the times the ceiling must be adjusted is when an enterprise is either qualified or disqualified, *i.e.*, when a certain revenue stream becomes subject to the cap or ceases to be subject to the cap. The requisite adjustment is intended to hold harmless the total volume of money the government can take from the people. For the total amount of money being moved from the private to public sector to remain constant, the cap must be lowered by the projected amount of revenue from the revenue stream in question before it was transferred to the enterprise. In this case, that amount was $600.6 million, but the General Assembly only lowered the cap by $200 million. Therefore, the cap is currently $400.6 million higher than it should be. *See* Pls.' Mot. at 38–39.

Defendants' interpretation of when the cap needs to be lowered is based on whether the revenue stream in question was used to *calculate* the initial cap, not whether it was previously *subject* to the cap. This approach flies in the face of the rule of construction for interpreting TABOR. The Colorado Constitution directs that when courts are interpreting TABOR, the "preferred interpretation [is the one that] reasonably restrain[s] most the growth of government."

Colo. Const. art. X, § 20(1). But "this principle . . . applies only where the text . . . supports multiple interpretations equally." *Barber*, 196 P.3d at 247–48; *see also Mesa Cty. Bd. of Cty. Comm'rs v. Colorado*, 203 P.3d 519, 527 (Colo. 2009) (The rule is "an interpretive guideline a reviewing court may employ when it finds two separately plausible interpretations of [TABOR's] text."). That is exactly the position the Court finds itself here. The text of TABOR does not answer the question presented. Thus, the constitution directs the Court to choose the interpretation that reasonably restrains most the growth of government. The only limitation on this rule of construction is if the interpretation would "hinder basic governmental functions or cripple the government's ability to provide services," *Barber*, 196 P.3d at 248. Requiring the cap to be lowered by an additional $400.6 million would not cripple state government. Indeed the General Assembly lowered the cap by $200 million in SB 17-267, and Defendants' own example of a proper reduction of the cap, the Division of Unemployment Insurance, resulted in a $424 million reduction in FY 2009–10. *See* Defs.' Mot. at 34.

Defendants also argue the cap does not need to be lowered because it "is in exactly the same position it would have been had the program been set up as an enterprise from the beginning." *Id.* at 33. That argument is of no moment. There are certainly all manner of revenue streams currently flowing into TABOR districts that could have been created in enterprises in the first instance. But they weren't, and because they weren't, the revenue generated is subject to the cap. The "qualification or disqualification" provision exists in TABOR to prevent districts from shifting revenue streams that are subject to the cap into enterprises and gaming the system, thereby increasing the total amount of revenue they can raise. And that is exactly what occurred in this case. Defendants are transparent that it was only

because the Hospital Provider Charge was putting upward pressure on the state excess revenues cap that the General Assembly shifted the stream into an enterprise. *See id.* at 36–37 ("The structure of the fee, and its interaction with TABOR, was causing pressure on the state budget. Hospital Provider Fee revenue was countable for TABOR purposes, and could drive the state revenues over the excess state revenues cap, which would trigger TABOR refunds."). Once that revenue stream was shifted out from under the cap, the General Assembly was liberated to raise an additional $600.6 million under the cap that had previously been occupied by the Hospital Provider Charge. This new cushion is exactly the type of improper growth of government that TABOR's "qualification or disqualification" provision guards against. The General Assembly ceded $200 million of that cushion in SB 17-267, which reveals that it knew it had a large gap of new authority, but that still left it with an unauthorized $400.6 million growth in government.

To conclude, if the Court finds that the Healthcare Charge is a fee and not a tax, it must also find that CHASE qualified as an enterprise when it met the constitutional definition and was given the authority to collect a revenue stream that was previously subject to the state excess revenues cap. The General Assembly failed to lower the cap by the requisite amount and, because the state has never held a vote to permit the state to retain the excess revenue that has been collected as a result, the cap must be lowered and a refund to the people is due.

IV. SB 17-267 violated the Colorado Constitution's single-subject requirement.

Plaintiffs have challenged the validity of SB 17-267 in its entirety by alleging and arguing that it violated the Colorado Constitution's single-subject requirement because its substantive provisions were not all directly related to its stated purpose. *See* Second Am. & Supplemented Compl. ¶¶ 172–85.; Pls.' Mot. at 26–33. Defendants oppose this claim by

asserting that the bill's provisions are sufficiently related to the "sustainability of rural Colorado." Defs.' Mot. at 35–40. Defendant-Intervenor opposes this claim by reciting a long history of the single-subject requirement and arguing that the established jurisprudence should only apply to initiatives and not legislative bills. Def.-Int.'s Mot. at 14–25

A. Defendants have failed to demonstrate the disparate provisions of SB 17-267 are directly related to its stated purpose.

Plaintiffs and Defendants largely agree on the law the Court should apply to this claim, expect that Defendants do not distill the three-part test that Plaintiffs provided. *See* Pls.' Mot. at 26 ("(1) a bill must contain one unifying subject, (2) there must be a purposive element or modification of the bill's subject; and (3) all substantive provisions in the bill must be dependent on and connected to that purpose or modification."). Defendants' failure to analyze SB 17-267 through this lens exposes the infirmity of their argument.

Defendants rely largely on the General Assembly's attempt to sweep SB 17-267's disparate provisions under one broad heading by claiming that everything that is good for the whole state is good for rural Colorado and vice versa. *See* Defs.' Mot. at 37–38 ("The General Assembly further found and declared that 'the sustainability of rural Colorado is directly connected to the economic vitality of the state as a whole, and that all of the provisions of this act, including provisions that on their face apply to and affect all areas of the state but that especially benefit rural Colorado, relate to and serve and are necessarily and properly connected to the general assembly's purpose of ensuring and perpetuating the sustainability of rural Colorado.'") (citing SB 17-267 § 1). Defendants' proposition that anything that helps the whole state also helps rural Colorado is belied by common experience and at least two U.S. Supreme Court cases noting the conflict between urban and rural interests. *See Reynolds v. Sims*, 377 U.S.

533, 567 n.43 (1964) (discussing tension between urban, rural, and suburban areas in apportionment controversies); *Baker v. Carr*, 369 U.S. 186, 321 n.136 (1962).

Further, as Plaintiffs have already argued, such broad platitudes will not save a bill with disconnected provisions. *See* Pls.' Mot. at 28 (citing *In re No. 43*, 46 P.3d 438, 442 (Colo. 2002) (A "proponent's attempt to characterize his initiative [or bill] under some overarching theme will not save an initiative [or bill] containing separate and unconnected purposes."); *In re No. 89*, 328 P.3d 172, 177 (Colo. 2014) (noting the standard is not met "simply by claiming that each proposed change falls under the same general overarching theme")).

Defendants' efforts to explain how SB 17-267's individual substantive provisions directly relate to the sustainability of rural Colorado fares no better than the arguments in the cases above. First, Defendants argue that the allocation of twenty-five percent of the transportation funding to rural Colorado is enough to save the other seventy-five percent, which necessarily is directed to non-rural Colorado. Defs.' Mot. at 38. In doing so, Defendants argue that this allocation "is particularly compelling given the legislator materials showing that traditionally most of those funds would have gone to non-rural areas." *Id*. But in SB 17-267, *most of the funds still go to non-rural areas*. The law favors *non-rural* areas by a three-to-one margin.

Second, Defendants claim that the one-time use of $30 million of marijuana sales tax revenue for rural schools is enough to justify the permanent raising of that tax without future allocations to a rural use. *Id*. at 38. But that tax increase must be directly related to the bill's purpose and, outside the one-time payment, there is no direct connection to the sustainability of rural Colorado. The Final Fiscal Note accompanying SB 17-267 makes this lack of connection explicit: "*For FY 2017–18 only*, marijuana tax revenue transferred from the General Fund to the

[State Public School Fund] is appropriated . . . for disbursement to schools in rural and small rural school districts[.] For FY 2018–19 and subsequent fiscal years, marijuana tax revenue . . . is appropriated . . . for school finance, and for funding charter schools[.]" Ex. 5 at 4 (emphasis added). If the marijuana sales tax had been increased for only one year and the resulting funds sent to rural schools, then Defendants' argument might hold water. But that is not what SB 17-267 does. The provision fails to meet the requirement that "all of [a bill's] provisions relate directly to its single subject." *In re No. 91*, 235 P.3d 1071, 1076 (Colo. 2010).

Third, in defense of the adjustment to the business personal property tax credit and the senior homestead exemption program, Defendants rehash the same flawed argument that provisions that apply to the whole state have a particular benefit for rural Colorado. Defs.' Mot. at 39. Defendants argue that the business personal property tax credit was "designed to benefit small businesses" but they provide no evidence that this provision is directly related to rural Colorado rather than the state as a whole. *Id.* They also argue that protecting the senior homestead exemption program benefits rural Colorado because it has "higher aging populations and more stagnant home values." *Id.* But, other than unsupported, conclusory statements in an affidavit, Defendants provide no hard evidence—such as small business distribution statistics, usage of the senior homestead exemption based on geographic location, or econometric models—to support their claim that these two provisions are directly related to the sustainability of rural Colorado rather than the state as a whole.

Fourth, Defendants assert that funding for controlled maintenance of public buildings is sufficiently germane to SB 17-267's stated subject. *Id.* at 39. In making this argument, Defendants do not cite any provision of SB 17-267 but rely solely on Mr. Sobanet's affidavit. *Id.*

(citing Aff. of H. Sobanet ¶ 32).[10] That affidavit states, "Controlled maintenance funding from S.B. 17-267 has been directed . . . at [academic] facilities in rural areas of the state[.]" Although SB 17-267 does direct funding to controlled maintenance of academic facilities, *see* SB 17-267 § 5, there is no provision or other indication in the bill that restricts the use of funds to rural schools. *Compare id. with* SB 17-267 §§ 4, 31 (specifically directing a small portion of funding to rural schools and rural roads).

Finally, and perhaps most tellingly, Defendants are silent on and make no attempt to legitimize the majority of the provisions that are so facially unrelated to the bill's stated purpose as to make an attempted defense too risible to offer, including: doubling Medicaid copays at pharmacies statewide, a two-percent reduction in most department budgets, lowering the excess state revenues cap by $200 million, and authorizing participation in a federal program to care for children with complex medical conditions. *See* Pls.' Mot. at 30 (citing statutory provisions).

Sometimes the "mere recitation of the[] provisions [can be] sufficient to demonstrate that [a bill] embraces such a diversity of subjects as to compel the conclusion that [it] violates the single subject requirement." *In re House Bill No. 1353*, 738 P.2d 371, 373 (Colo. 1987). That certainly is the case here, where the many provisions of SB 17-267 relating to non-rural Colorado and the state as whole demonstrate beyond any reasonable doubt its violation of the single-subject requirement.

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[10] Although Defendants cite to Paragraph 32, their intended reference must have been to Paragraph 33 because that is the only paragraph of the Sobanet Affidavit that references controlled maintenance funding.

B. Defendant-Intervenor invents a novel framework for single-subject challenges, but even under that test, SB 17-267 would still be invalid.

Defendant-Intervenor spends most of its brief trying to undo decades of jurisprudence on the single-subject requirement. Def.-Int.'s Mot. at 14–25. Defendant-Intervenor seeks to draw a distinction between the single-subject requirement in Article V Section 1, which applies to ballot initiatives, and Article V Section 21, which applies to legislation, except general appropriations bills. *See* Colo. Const. art. V, § 1(5.5); Colo. Const. art. V, § 21; Def.-Int.'s Mot. at 16 ("[C]ourts should not necessarily approach these distinct provisions identically."). But to do so, Defendant-Intervenor ignores a string of binding cases from the Colorado Supreme Court and invents a new test, under which SB 17-267 would still be invalid.

Defendant-Intervenor apparently wants to create new law in this area that would authorize exactly the type of "log rolling" and "horse trading" that resulted in the amalgamation of disparate provisions that has been labeled SB 17-267. Defendant-Intervenor relies on *Catron* for much of its argument, claiming that in 1893 the Colorado Supreme Court understood horse trading was part of the legislative process and therefore the single-subject requirement in Section 21 could not have been meant to prohibit that practice. *See* Def.-Int.'s Mot. at 16 ("horse-trading . . . has been recognized as part and parcel of the legislative process in enacting statutes") (citing *Catron v. Bd. of Comm'rs of Archuleta Cty.*, 33 P. 513, 514 (Colo. 1893)). The problem with Defendant-Intervenor's argument is that *Catron* is explicit that Section 21 was designed to prevent, not authorize, that behavior. As Plaintiffs have already explained, *Catron* is clear that Section 21's single-subject requirement "is designed to prevent 'log rolling,' that is, 'putting together in one bill subjects having no necessary . . . connection, for the purpose of enlisting in

support of such bill the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits[.]'" Pls.' Mot. at 27 (citing *Catron*, 33 P. at 514).

Defendant-Intervenor's efforts to divide the jurisprudence of the two provisions is further confounded by binding Colorado Supreme Court precedent stating that the two provisions are interpreted in the same way. In *In re No. 25*, the Colorado Supreme Court provided a detailed history of the addition of Section 1's single-subject requirement, which applies to ballot initiatives. 974 P.2d 458, 463 (Colo. 1999). In that history, the court explained:

> [T]he General Assembly enacted legislation that explained its rationale for extending the single-subject/clear title requirement to initiated and referred measures. *See* § 1–40–106.5. This legislation stated that "in setting titles pursuant to section 1(5.5) of Article V, the initiative title setting review board . . . should apply judicial decisions construing the constitutional single-subject requirement for bills[.]" § 1–40–106.5(3). In so stating, the General Assembly reiterated its intent that *the standards developed for the analysis of bills as discussed above be applied to the interpretation of citizen initiatives*.
>
> We first interpreted the new constitutional provision in *In re Proposed Initiative on "Public Rights in Waters II,"* 898 P.2d 1076 (Colo.1995). Mindful of the legislative history which *requires us to evaluate the single-subject/clear title mandate in initiatives in the same way that we evaluate single subjects and clear titles in bills*, we relied upon the standard that we had established in *Sours*, *Catron*, and *Breene*.

Id. (footnote omitted, two emphases added and one removed). Defendant-Intervenor claims that "there is a no [sic] dearth of case law addressing Section 21's single-subject requirement for statutes, requiring courts to borrow from more recent Section 1(5.5) jurisprudence to address Section 21 challenges." Def.-Int.'s Mot. at 16–17. But the quotation above from *In re No. 25* shows that the opposite is true. The General Assembly directed that Section 1 ballot-initiative challenges be interpreted according to the more-than one-hundred years of existing jurisprudence from Section 21's legislative single-subject requirement, *i.e.*, "*Sours*, *Catron*, and *Breene*." *In re*

No. 25, 974 P.2d at 463. Further, the Colorado Supreme Court has relied on its own holding from *In re No. 25*—that the two single-subject requirements be read the same way—in multiple subsequent opinions. *See, e.g.*, *In re No. 156*, 413 P.3d 151, 153 (Colo. 2016); *In re No. 76*, 333 P.3d 76, 78–79 (Colo. 2014); *Hayes v. Ottke*, 293 P.3d 551, 555 (Colo. 2013); *In re No. 62*, 184 P.3d 52, 56 (Colo. 2008).

Attempting to tack against this prevailing wind, Defendant-Intervenor proposes a new test that includes: "log rolling cannot be prevented," "[b]roader, more comprehensive titles are therefore a good thing, because they provide better notice," but subjects are too broad if the bill is "about raising and spending money." Def.-Int.'s Mot. at 25. But even under this novel and unmoored standard, which this Court is bound to reject on the basis of controlling Colorado Supreme Court precedent, SB 17-267 would still be invalid.

Defendant-Intervenor proposes a limitation on its standard, writing: "How broad [of a single subject] is too broad? Bills about raising and spending money. That is the subject of appropriations bills, which are exempted from the single-subject requirement[.]" *Id.*[11] Thus, according to Defendant-Intervenor, the only type of bill that would run afoul of the single-subject requirement, not including the exempted annual long appropriations bill, is one that seeks to raise and spend money on (presumably) disparate subjects.

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[11] Defendant-Intervenor also makes the irrelevant argument that the Court should be deferential to budget bills because "looming large over every such TABOR analysis is the caution against interpreting TABOR in a way that would 'cripple the government's ability to function.'" Def.-Int.'s Mot. at 18–19 (citing *TABOR Found. v. Reg'l Transp. Dist.*, 417 P.3d 850, 859 (Colo. App. 2016). Defendant-Intervenor's argument is inapposite because Plaintiffs' single-subject challenge is not based on an interpretation of TABOR.

Yet that is exactly what SB 17-267 does. It is rife with provisions that raise and spend money, and it spends that money on items that are not directly related to the bill's stated purpose. For example, SB 17-267 raises money by authorizing $2 billion in lease-purchase agreements on state property, increasing the marijuana sales tax rate, authorizing CHASE to levy the Healthcare Charge, and altering the income tax credit for business personal property. *See* Pls.' Mot. at 30 (citing statutory provisions). And it spends money by divvying up the $2 billion in lease-purchase funding for various transportation projects across the state, allocates the increased marijuana sales tax revenue for schools in varying locations, directs CHASE to spend funds on hospital reimbursements and business consulting services, and cuts state department budgets by two percent. *Id.* Defendant-Intervenor admits as much in its own motion, urging that the "Court should be mindful that S.B. 17-267 is complex and detailed legislation addressing the state budget[.]" Def.-Int.'s Mot. at 18. Therefore, even under the test that Defendant-Intervenor invents, SB 17-267 would *still* be invalid because it violates the single-subject requirement.

Plaintiffs stand by the argument in their motion for summary judgment that the proper analysis the Court should apply is the three-part test they summarize. *See* Pls.' Mot. at 26. Under that test and Colorado Supreme Court precedent, there can be no doubt that SB 17-267 is invalid for violating the single-subject requirement.

CONCLUSION

Thus, the Court should grant Plaintiffs' motion for summary judgment and deny Defendants and Defendant-Intervenor's motions. Further, Plaintiffs request an oral hearing on these motions because they present an issue of first impression and the issues are sufficiently complex that Plaintiffs believe the Court would benefit from an oral hearing.

DATED this 6th day of August, 2018.

Respectfully submitted,

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