DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: August 20, 2018 4:13 PM FILING ID: A45FCCCED4018 CASE NUMBER: 2015CV32305
PLAINTIFFS: TABOR FOUNDATION, *et al.*, v. **DEFENDANTS:** COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, *et al.*, and **INTERVENOR**: Colorado Hospital Association.	▲ **COURT USE ONLY** ▲
POLSINELLI PC Sean R. Gallagher #16863, sgallagher@polsinelli.com Gerald A. Niederman #12449, gniederman@polsinelli.com Bennett L. Cohen #26511, bcohen@polsinelli.com 1401 Lawrence Street, Suite 2300 Denver, CO 80202 (303) 572-9300 *Attorneys for Intervenor Colorado Hospital Association*	Case No. 2015 CV 32305 Div. 275

COLORADO HOSPITAL ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Intervenor Colorado Hospital Association (CHA), pursuant to C.R.C.P. 56 and 121 § 1-15, replies in support of its motion for summary judgment.

I. ARGUMENT

A. All parties agree that this matter can be resolved on summary judgment.

This is not a case involving a transaction or event giving rise to factual disputes, but a legal challenge to a government program based on essentially undisputed facts. All parties therefore agree that this dispute is well postured for resolution on summary judgment. Plaintiffs have identified no factual disputes that could forestall summary judgment for Defendants.

B. The CHASE HASF is a TABOR-exempt fee, implemented by a lawful enterprise.

The key question in this dispute is whether the CHASE HASF is a tax or a fee for TABOR purposes. TABOR does not define "tax" or "fee." As CHA has explained in its prior summary judgment briefing, this Court does not interpret those terms from scratch, but necessarily applies the authoritative interpretations supplied by the Colorado Supreme Court. The Supreme Court's discussion of taxes and fees in the seminal TABOR case of *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008), and more recently *Colorado Union of Taxpayers Foundation v. City of Aspen*, 2018 CO 36, establishes the framework for this Court's analysis.

Barber adopted an analytical framework from pre-TABOR case law such as *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989) which defines fees broadly, and gives the General Assembly flexibility to generate revenue to run specific

government programs through carefully-defined fees without triggering TABOR voter approval requirements. *See*, *e.g.*, *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1191 (Colo.App. 2005) (noting that *Bloom*'s analysis could arguably lead to "almost any governmental service being structured as a fee, thereby escaping TABOR," and simultaneously accepting this approach because a lower court may not reject the applicable analysis of the Colorado Supreme Court).

Aspen has reaffirmed the analytical framework of *Bloom* and *Barber*. Reading the controlling majority opinion of *Aspen* against the dissenting opinions, it is clear that the Colorado Supreme Court has considered and continues to reject the approach to fees and taxes advocated by Plaintiffs here.

The dissenting view in *Aspen*, which Plaintiffs advocate, is not without adherents – three justices interpreted fees narrowly as the payment of money by citizens for a government good or service of equal value, and would treat any other form of government revenue as a tax. But the dissenting view is not the law. This Court necessarily follows the majority analysis of *Aspen*, confirming the broad and flexible approach to fees developed in such cases as *Bloom* and *Barber*. The result may be that Colorado's legislative and executive branches have refashioned parts of the state government from tax-based programs into fee-based programs, *see* State's response brief at 14 (listing various government fee programs), but that is entirely lawful since the Colorado Supreme Court has affirmed that this approach comports with TABOR. Having given its approval to this approach, only the Colorado

Supreme Court can withdraw that imprimatur. *People v. Novotny*, 2014 CO 18, ¶ 26 (the Colorado Supreme Court "alone can overrule [its] prior precedents concerning matters of state law").

The remaining enterprise analysis is disposed of by case law such as *TABOR Foundation v. Colorado Bridge Enterprise*, 2014 COA 106, which applies the broad and flexible view of fees recently confirmed by *Aspen* in the government enterprise context. As discussed in CHA's prior summary judgment briefing, *Colorado Bridge* is the most apposite enterprise case, and it squarely confirms that CHASE is a lawful enterprise.

Plaintiffs attempt a linguistic end-run around the analysis of *Colorado Bridge*, which leads nowhere. Plaintiffs try to distinguish the CHASE HASF and prior hospital provider fee from other government fees based on the unique way that the HASF operates. As Plaintiffs acknowledge, the *raison d'être* of the HASF is to enhance the availability of federal matching funds that CHASE can then distribute to Colorado hospitals, including in particular rural hospitals that face special funding challenges. *E.g.* Plaintiffs' response brief at 22. But Plaintiffs' argument ignores how, in order to enhance federal matching funds, the State must first raise the funds to be matched. Plaintiffs ignore the benefit, and artificially compare the government's costs of administering the hospital fee (on the order of ten million dollars in recent years) to the charge itself (on the order of hundreds of millions in recent years). *See* chart at Plaintiffs' summary judgment motion at 20.

While Plaintiffs may generally oppose government programs as wasteful, they go too far in suggesting such government waste here. CHASE does not operate as Plaintiffs suggest because one of the services that CHASE provides to Colorado hospitals is the generation of hundreds of millions of additional dollars through participation in Medicaid's matching program. Plaintiffs attempt to exclude this massive financial benefit from their analysis by arguing that "*Colorado Bridge Enterprise* does not discuss or even mention the concept of benefit." Plaintiffs' response at 15. However, a simple word search confirms that *Colorado Bridge* uses the word "benefit" 18 times in discussing the government services provided by the Bridge Enterprise in exchange for the fees paid to support the Enterprise. Facilitating payment of federal matching funds is not some abstract or trivial benefit provided the CHASE HASF, but one of CHASE's primary services.

And with the CHASE HASF, the benefit received is entirely reasonable in relation to the charge imposed as required by *Aspen* and *Colorado Bridge*. By obtaining increased federal matching funds, the HASF provides Colorado hospitals with hundreds of millions of dollars to help keep facilities in the black and minimize cost shifting onto patients with better private insurance. *See* Christopher Tholen report attached to CHA's summary judgment motion at 6 (describing how the CHASE HASF expands Medicaid eligibility, reduces the level of under-reimbursement, reduces cost shifting to patients with private insurance, and thereby lowers the cost of health care for all Coloradans).

Plaintiffs also challenge CHASE's enterprise status by arguing that its funding and financial accounting are not sufficiently independent of the General Assembly. Plaintiffs' response at 16-21. However, the sort of financial accounting that Plaintiffs describe is to be expected for any legislatively-created and government-run enterprise that operates within the State Department of Health Care Policy and Financing – just as the Colorado Bridge Enterprise operated within the Colorado Department of Transportation. *See Colorado Bridge*, 2014 COA 106 ¶15. Critically, and dispositively, while Plaintiffs make a variety of arguments about the legislature's involvement in CHASE's funding, *see* Plaintiffs' response at 18, they do not and cannot argue that funds raised by the CHASE HASF are used by the General Assembly for general expenditures, or for anything other than CHASE's legislatively defined mission of increasing access to and improving the delivery of healthcare services. The fact that the dollars involved are large, and the accounting commensurately complex, does not suggest (let alone prove beyond a reasonable doubt) that CHASE fees and expenditures are used for anything other than CHASE's healthcare mission in a way that would violate TABOR. *See Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 8 (Colo. 1993) (TABOR does not forbid the dedication of government revenues to a specific purpose).

Accordingly, Plaintiffs' TABOR challenges to the CHASE HASF and the prior hospital provider fee must fail. These charges are fees, not taxes, and the current

HASF is administered through a lawful TABOR-exempt enterprise. The General Assembly's ability to turn discrete government functions into TABOR-exempt enterprises may strike some as contrary to TABOR's spirit and overall philosophy, but the practice has occurred many times, and has received consistent approval from the Colorado Supreme Court. *See Colorado Bridge*, *supra*; State's response brief at 14 (listing government fee programs, and collecting cases upholding these fee programs from TABOR challenges). Any judicial disapproval of this established practice as urged by Plaintiffs can come only from the Colorado Supreme Court. *Novotny*, *supra* (only Colorado Supreme Court can reverse its prior decisions on matters of state law); *Bruce*, *supra* (lower courts may not "change a test announced by our supreme court").

C. Establishing CHASE did not violate TABOR's revenue limitations.

Plaintiffs' devote a large portion of their response brief to their claim that the General Assembly should have lowered the state excess revenue cap by approximately $400 million when creating CHASE. *See* Plaintiffs' response brief at 23-32.

Because the State Defendants have significant expertise regarding the qualification and disqualification of enterprises and how such procedures do or do not impact the excess revenue cap, CHA defers to the detailed arguments in the State Defendants' summary judgment motion (pages 30-35) and response (pages 25-30) on this issue.

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

Plaintiffs' summary judgment motion offers a test for single-subject compliance of Plaintiffs' own invention, and unsurprisingly argues that SB 17-267 fails this test. *See* Plaintiffs' motion at 26.

CHA stands by its analysis of the Article V Section 21 single-subject requirement for statutes, which is based on pertinent and controlling Colorado Supreme Court case law interpreting this constitutional provision – not the similar but distinct provision for ballot initiatives, and not Plaintiffs' novel theory involving "purposive elements and modifications" which is not found in any relevant authority but instead expresses Plaintiffs' peculiar gloss on ballot initiative case law. Under the still vital, relevant and controlling trio of early cases, *Catron v. Board of Com'rs of Archuleta County*, 33 P. 513, 514 (Colo. 1893), *In re Breene*, 24 P. 3 (Colo. 1890), and *People ex rel. Elder v. Sours*, 74 P. 167 (Colo. 1903), as supplemented by the relatively recent case of *In re House Bill No. 1353*, 738 P.2d 371 (Colo. 1987), SB 17-267 satisfies the constitutional single-subject requirement.

1. This Court need not and should not look to ballot initiative case law for this statutory challenge.

Colorado courts necessarily borrow from old and well-established Section 21 case law to interpret the new Section 1(5.5) single-subject requirement for ballot initiatives, but that is no reason for this Court to decide this Section 21 challenge using Section 1(5.5) case law.

Colorado adopted the single-subject requirement for ballot initiatives in 1994, through legislative referral, in the wake of upheaval wrought by the recent enactment of TABOR. *See 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). At the same time it made the referral, the General Assembly enacted C.R.S. § 1-40-106.5, which declared *inter alia* that the General Assembly intended that its proposed constitutional single-subject requirement for ballot initiatives, if and when adopted, should be interpreted using the judicial standards that the Colorado Supreme Court had developed and refined for over a century through Section 21 cases. *See* C.R.S. § 1-40-106.5(1)(d). But while the General Assembly can suggest that courts use an existing analytical framework for new legislation, that does not direct courts to substitute different Section 1(5.5) case law instead of Section 21 precedent properly applicable to this Section 21 challenge.

The only arguable reason for this Court to consider Section 1(5.5) case law here is because there have been many recent Section 1(5.5) cases. In the contemporary political environment, many ballot initiatives have been proposed since the mid-1990s, and as a result the Colorado Supreme Court has addressed the single subject requirement for these ballot initiatives in numerous modern cases. There are therefore many more modern Section 1(5.5) cases than Section 21 cases.

But SB 17-267 is a bill, not a ballot initiative, and Plaintiffs bring a Section 21 challenge to this legislation. These different constitutional provisions address two different types of law. As detailed in CHA's summary judgment response (pages 15-16), statutes receive a defined and thorough vetting, analysis and review involving professional legislators and staff just to reach the committee stage, while the only meaningful institutional review for ballot initiatives is the single-subject and clear title review undertaken by the Colorado Supreme Court. That is why – even though the single-subject analysis for ballot initiatives was derived from the statutory analysis – this Court should focus on Section 21 cases here, rather than borrow abstract language from or analogize to more recent Section 1(5.5) ballot initiative cases decided in the recent wild west of the post-TABOR ballot initiative process.

2. Section 21 is about notice – it is not a ban against log rolling.

Breene, *Catron*, and *Sours* are written in an old-fashioned, denser style that can be difficult for modern readers to parse. But that does not make these early cases any less authoritative – it just means that modern readers are more likely to ignore them, or only skim them. That is why modern readers may be surprised to discover, upon their first close reading of *Catron*, that the case actually holds that while "log-rolling" may be undesirable, Section 21 does not prevent this unavoidable aspect of legislative practice. *Catron*, 33 P. at 513. The purpose of Section 21's single-subject requirement for statutes is to provide notice, so legislators and voters

are not surprised by "unknown and alien subjects which might be coiled up in the folds" of a bill. *Id.*; *In re Breene,* 24 P. at 3-4.

Plaintiffs offer nothing to contradict this still controlling interpretation of Section 21. Plaintiffs' suggestion that the *Catron* court somehow misspoke (*see* Plaintiffs' response brief at 37) cannot carry the day here. This Court must take *Catron* at its word and leave any overruling or limiting of the case's language to the current Colorado Supreme Court. *Novotny*, *supra* (only Supreme Court can overrule its prior precedent). Likewise, to the extent that any sort of tension may have evolved between the modern Section 1(5.5) case law that Plaintiffs primarily rely upon, and the older but still vital and authoritative Section 21 case law like *Catron*, that tension is for the Supreme Court to resolve. The Court must apply the apposite Section 21 case law to determine this matter.

3. SB 17-267 is within the single-subject bounds demarcated by *In re House Bill No. 1353.*

Catron does not prohibit log-rolling. *Catron* and *Breene* expressly approve of broad titles so as to give legislators and voters ample notice of the ingredients going into the legislative sausage. The question "How broad is too broad?' is answered by *In re House Bill No. 1353*, which holds that bills whose subject is the general raising and spending money for the State are too broad, unless such bills are appropriations bills. 738 P.2d at 371-72 and n.2; *see* Colorado Constitution Article V Section 32 (additional requirements for appropriations bills).

The procedural posture of *House Bill No. 1353* does not illuminate how lower courts should navigate near this limiting principle, since this case came to the Supreme Court on an interrogatory from Governor Romer. But the case's political posture informs this Court's analysis. Governor Romer challenged House Bill 1353 as too broad by submitting an interrogatory to the Supreme Court to review the bill for Section 21 compliance. Governor Hickenlooper, by contrast, has made no such challenge to SB 17-267.

In that vein, the third case in the trio of early Section 21 cases indicates that where, as here, the political branches of government support a legislative solution to a particular problem, and the solution has been operating for some time, courts should hesitate to upset this political balance. Specifically, in *Sours* the Supreme Court stated the familiar interpretive principle that Section 21's single-subject requirement is satisfied when a bill's provisions are "all tending to effect and carry out one general object or purpose, and all connected with one subject." *Sours,* 74 P. at 178. The Supreme Court then followed the general rule with this observation:

> A construction which has been uniformly adopted by all the departments of the government for a series of years is entitled to great weight in settling by judicial decision what construction should be placed upon it.

Id.

Here, the hospital provider fee operated successfully for some eight years. The CHASE HASF has continued the provider fee's operation with support from both the General Assembly and the Governor. The judicial branch may have the

final say as to what is or is not constitutional, but the above holding from *Sours* cautions against upsetting this political equilibrium – especially given the magnitude of the stakes at issue.

4. The "fit" between the provisions of SB 16-267 and rural Colorado is sufficient, given the deferential nature of review.

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. The Sutherland treatise concretely addresses the appropriate type of "scrutiny" applicable to determining whether a bill's provisions are sufficiently related to its subject. 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. Sutherland § 17:2 at notes 4-6 ("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.") This deferential approach is clearly appropriate in this area of taxes, budgeting and state finance, where legislative expertise and power are at their zenith.

Plaintiffs characterize the relationship between some provisions of SB 17-267 and rural Colorado as "risible." Plaintiffs' response brief at 36. But the same sort of argument could be offered against any of the deferential rational basis scrutiny analyses for economic or regulatory legislation from familiar equal protection

jurisprudence, starting with *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the federal Agricultural Adjustment Act of 1938 could prohibit a farmer from growing wheat for private consumption). *Wickard* initially received criticism similar to what Plaintiffs offer here: that it is boundless and an abdication of judicial authority. But the deferential rational basis scrutiny adopted in *Wickard* has now become familiar and respected. It is still a type of principled judicial review, and though deferential it does have its limits. *See United States v. Lopez*, 514 U.S. 549, 556-57 (1995) (defining limits of Congress's Commerce Clause power). So too here, the Colorado Supreme Court has supplied limits for how broad the subject of a bill can be without violating Section 21. *In re House Bill No. 1353*, *supra*. Because supporting rural Colorado is less broad than raising and spending money generally, SB 17-267 satisfies the deferential review standard that the Colorado Supreme Court directs lower courts to apply to Section 21 challenges. *See Catron*, *supra*; *Breene*, *supra*; *Sours*, *supra*; Sutherland treatise, *supra*.

II. 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 20, 2018.

POLSINELLI PC

/s/ Sean R. Gallagher
Sean R. Gallagher
Gerald A. Niederman
Bennett L. Cohen
Attorneys for Intervenor Colorado Hospital Association

CERTIFICATE OF SERVICE

I certify that on August 20, 2018, the foregoing was served on all parties to this action via Colorado Courts E-Filing or by U.S. mail.

/s/ _____
Polsinelli PC