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DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO
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Denver, Colorado 80202

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

v.

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

and

COLORADO HOSPITAL ASSOCIATION,
Defendant-Intervenor.

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Case No. 2015 CV 32305

Div. 275

REPLY IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Contents

Defendants Colorado Department of Health Care Policy and Financing ("HCPF" or the "Department"), Colorado Healthcare Affordability and Sustainability Enterprise ("CHASE"), Kim Bimestefer, in her official capacity, Colorado Department of the Treasury, Walker Stapleton, in his official capacity, and the State of Colorado (altogether the "State Defendants") offer the following in support of their motion for summary judgment.

There are No Factual Disputes that Require a Trial

At the close of briefing, there are no disputed genuine issues of material fact that require a trial to resolve. Plaintiffs note that the State's motion does not contain a formal recitation of the undisputed facts, despite that the State Defendants have provided sufficient evidence to support their motion, and they criticize the State's use of affidavits to support summary judgment. Pls.' Resp. at 1–2. There is, of course, no requirement for a formal statement of undisputed facts, and a motion for summary judgement may be supported by affidavits. C.R.C.P. 56(e). Documents that a party relies on can be introduced through a sworn affidavit. *Id.* The undisputed facts in the State Defendants' motion are identified plainly, and are supported by sworn testimony made on personal knowledge, as required by the rules.

Affidavits *are* evidence. In fact, "[a] motion for summary judgment supported by an affidavit, to which no counteraffidavit is filed, establishes the absence of an issue of fact, and the court is entitled to accept the affidavit as true." *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008) (citing *Witcher v. Canon City*, 716 P.2d 445, 457 (Colo. 1986)). By contrast, "[a] court must disregard documents referred to in a motion for summary judgment that are not sworn or certified." *Cody Park Prop. Owners' Ass'n, Inc. v. Harder*, 251 P.3d 1, 4 (Colo. App. 2009). Further, "[u]nsworn expert reports are not admissible to support or oppose a motion for summary judgment." *McDaniels*, 186 P.3d at 87 (citations omitted).

Plaintiffs provide no sworn documents with any of their briefing. The vast majority of the exhibits they do supply are Department or CHASE materials, deposition transcripts, and legislative materials. Those materials are either permitted by Rule 56(e) or are readily ascertainable records of public activities. Any other unsworn documents and unsworn expert reports cannot be considered in determining undisputed facts in connection with the motions for summary judgment. Specifically, Exhibits 12, 17, and 20 to the motion and Exhibits 1 and 2 attached to the response cannot be considered.

Perhaps that is why, at the end of the day, 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." Pls. Resp. at 2. Rightly so. And any facts asserted by the State Defendants, supported by affidavit as permitted by the rule, and not challenged with counteraffidavits, establishes the absence of an issue of fact, and should be accepted as true. *McDaniels*, 186 P.3d at 87 (citing *Witcher*, 716 P.2d at 457).

ARGUMENT

I. Plaintiffs lack standing to maintain their challenge to the Hospital Provider Fee and the CHASE Fee.

As Plaintiffs admit, they "must establish the jurisdictional prerequisite of standing before a court will address their claims on the merits." Pls.' Resp. at 2 (citing *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77 ¶ 7). However, the State Defendants did not argue, as Plaintiffs suggest, that the Plaintiffs must demonstrate an economic injury. *Id.* at 4. Rather, the Plaintiffs lack standing because they have failed to demonstrate a nexus between themselves as taxpayers and the challenged government action.

Colorado courts have long required a taxpayer to demonstrate personal injury in order to bring suit. Generally "the one who bears the financial burden of a tax is a party aggrieved and

thus has standing to challenge a [property tax] assessment." *Hughey v. Jefferson Cty. Bd. of Comm'rs*, 921 P.2d 76, 78 (Colo. 1996); *United Air Lines, Inc. v. City & Cty. of Denver*, 973 P.2d 647, 652 (Colo. 1998) ("because the party who bears the financial burden of a tax is the party aggrieved, the second requirement of standing is also met."); compare with *Utah Motel Assocs. v. Denver Cty. Bd. of Comm'rs*, 844 P.2d 1290, 1294 (Colo. App. 1992) (citations omitted) (finding standing because taxpayer had borne the financial burden of the tax); *Wash. Plaza Assocs. v. State Bd. of Assessment*, 620 P.2d 52, 53 (citing *State v. Dickinson*, 286 So. 2d 529 (Fla. 1973)) ("One who does not bear the financial burden of tax suffers no loss or injury and has no standing to seek a refund.").

Further, although taxpayers undoubtedly enjoy broad taxpayer standing in Colorado, *Freedom from Religion Foundation*, 2014 CO 77 ¶ 12, taxpayer standing is not unlimited. The supreme court has "utilized the injury-in-fact requirement to provide conceptual limits to the doctrine when plaintiffs challenge an allegedly unlawful government action." *Id.* It has stated that in order "[t]o satisfy the injury-in-fact requirement, however, the plaintiff must demonstrate a clear nexus between his status as a taxpayer and the challenged government action." *Id.* (citing *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008)). The *Freedom from Religion* plaintiffs claimed standing to challenge the Governor's honorary proclamations based on the overhead necessary to issue them. ¶ 15. The supreme court determined that "such incidental overhead costs are not sufficiently related to Respondents' financial contributions as taxpayers to establish the requisite nexus for standing," and that if they were, "any and all members of the public would have standing to challenge literally any government action that required the use of a computer, basic office supplies, or state employee time." *Id.* That case thus distinguishes and limits *Barber*.

The supreme court has most recently discussed the nexus requirement in *Colorado Union of Taxpayers Foundation v. City of Aspen*, 2018 CO 36. It reiterated there that a plaintiff must

demonstrate "'a clear nexus between his status as a taxpayer and the challenged government action'" in order to have taxpayer standing. *Id.* ¶ 11 (quoting *Freedom from Religion*, 2014 CO 77 ¶ 12). The court found that the Foundation's two members had a nexus—and thus taxpayer standing—because they were the ones who had paid the bag fee. *Id.*

Where the required nexus is absent, a party lacks standing. In *Hotaling v. Hickenlooper*, 275 P.3d 723, 726 (Colo. App. 2011), the plaintiff asserted that he had standing because he was a Colorado taxpayer who alleged that a state department's action violated the constitution. *Id.* The court described how in other cases in which plaintiffs had taxpayer standing, there was a connection between the taxpayers and the expenditures of the funds that they had contributed in taxes. *Id.* In the case before the court, however, the funds in question were federal funds, not state funds. *Id.* The *Hotaling* court concluded that the supreme court "did not intend to dispense with the requirement that there be some nexus between the plaintiff's status as a taxpayer and the challenged government action." *Id.* 726–27. As the plaintiff had not contributed any of the funds as a state taxpayer that were used in the allegedly unconstitutional fashion, the court found that he did not have standing to challenge those actions. *Id.* at 727.

In support of their attempt to prove standing here, Plaintiffs argue that Ms. Sopkin and Mr. Hoopes received medical services at Lutheran Medical Center in state fiscal year 2011-12 and calendar year 2015 respectively. Pls.' Resp. at 7, 11. They also assert that Mr. Rankin received services at Good Samaritan Medical Center in October 2017. *Id.* at 8. Plaintiffs assert that both hospitals did not receive as much back in supplemental payments received as they paid in fees, and that they therefore must have borne that "loss." *Id.* at 7–8, 11.

At the outset, Exhibits 1 and 2 are heavily redacted documents that appear to be hospital bills. As they are unsworn, they cannot be considered by the Court in determining any facts at issue. *Harder*, 251 P.3d at 4. But even assuming that these facts are true, they do not prove

standing. Both Lutheran and Good Samaritan are part of the SCL Health system. State Defs.' Resp., Ex. T ¶¶ 2, 4; State Defs.' MSJ, Ex. A ¶ 15. The system level, and not the individual hospital, is the appropriate level to evaluate losses or gains from the fees. State Defs.' Resp., Ex. T ¶ 3; State Defs.' MSJ, Ex. A ¶ 14.

In 2011-12, the year in question for Ms. Sopkin, Lutheran was part of the Exempla system, which later merged with SCL Health. State Defs.' Resp., Ex. T ¶ 2; State Defs.' MSJ, Ex. A ¶ 15. During that fiscal year the Exempla system, including Lutheran, netted a positive $5.59 million in supplemental payments over what it paid in fees. State Defs.' MSJ, Ex. A ¶ 14, Ex. A-2; State Defs.' Resp., Ex. T ¶ 9. Good Samaritan netted $6.63 million in state fiscal year 2014-15 and $22.68 million in state fiscal year 2015-16. *Id.* Regardless of which half of the year Mr. Hoopes received services in, there was no "loss" to pass on to him and he did not pay the fee.[1]

As Plaintiffs note, the annual report for 2017 has not yet been released. They assert that Mr. Rankin received services at Good Samaritan and that "it is reasonable to conclude that [the hospital] lost money during FY 2017-18, the year Mr. Rankin received medical services." Pls.' Resp. at 8. This is a far cry from carrying their burden of proving standing. Moreover, the trends they cite do not support their conclusion. Between fiscal year 2010-11 and 2016-17, SCL Health, including Exempla and St. Mary's, netted just under $82 million in positive benefit from the supplemental payments. State Defs.' MSJ, Ex. A ¶¶ 13–17, Ex. A-2. The trend does not support the conclusion that there will be a "loss" to pass on to Mr. Rankin.

But the most critical fact in the analysis is that SCL Health does not pass the amount of the

[1] Plaintiffs appear to have abandoned their reliance on Mr. Foland for organizational standing. Discovery indicated he received services at Saint Joseph Hospital, which is also part of SCL Health, in February 2015. The facts that apply to the other named plaintiffs apply to Mr. Foland.

Hospital Provider Fee or CHASE Fee on to its patients, which it has plainly stated. State Defs.' Resp. ¶ 11. Regardless of when Ms. Sopkin, Mr. Hoopes, or Mr. Rankin received services at SCL Health facilities, they did not pay the fees they challenge. [2]

Like the federal funds in *Hotaling*, neither individual nor representative Plaintiffs have paid into the funds being spent, and thus lack the required nexus to those funds necessary to establish taxpayer standing. A party must have standing for a *claim* in order to bring the challenge contained in that claim. *Utah Motel Assocs.*, 844 P.2d at 1294 (citing *Maurer v. Young Life*, 779 P.2d 1317 (Colo. 1989)); *see also Butler v. Farner*, 704 P.2d 853, 857 n.8 (Colo. 1985). At a minimum, the first three claims for relief in this case must be dismissed for lack of standing.

II. The undisputed facts before the Court demonstrate that the Hospital Provider Fee and the CHASE Fee are fees and not taxes.

A. It is appropriate to review the benefits and services conferred in exchange for payment of a fee.

Plaintiffs claim that the motion for summary judgment misapplies the relevant law by focusing on the benefit hospitals receive. In their view, only the administrative costs of providing the benefit can "count" for purposes of the fee vs. tax analysis. Pls.' Resp. at 13–14. This is not so. The State Defendants' Response describes how benefits are in fact costs of the program. State Defs.' Resp. at 17–19. But moreover, controlling precedent is not exclusively focused on administrative overhead—it explicitly focuses on the benefits received by fee payers. *City of Aspen*, 2018 CO 36 ¶ 31 (citing *Barber*, 196 P.3d at 250 n.15) ("We must determine whether the

[2] Plaintiffs also claim standing because they believe that "the program" was funded with General Fund appropriations. Pls.' Resp. at 6. This is clearly incorrect based on the undisputed evidence before the Court and appears to be a misunderstanding of how the program works. State Defs.' MSJ, Ex. C ¶¶ 5–8, 10–13.

cost of the charge bears a reasonable relationship to the services Aspen provides to charge payers."); *TABOR Found. v. Colo. Bridge Enter.*, 2014 COA 106 ¶ 23 ("If [the language] indicates that the primary purpose of the charge is to finance a particular service, then the charge is a fee."), ¶ 60 ("We conclude that the CBE is a business because it pursues a benefit and generates revenue by collecting fees from service users.") As the *Colorado Bridge Enterprise* court put it, "[a]ny fee amount must be reasonably related to the overall cost of the service." 2014 COA 106 ¶ 26 (citing *Bloom v. City of Ft. Collins*, 784 P.2d 304, 308 (Colo. 1989)). Plaintiffs complain that the fee raised 21 times the amount of the administrative costs of the program. The undisputed evidence shows that money went back to the fee payers in services, which is a huge return on investment for paying that fee. Under the above case law, the Hospital Provider Fee and CHASE Fee are fees, not taxes.

B. CHASE provides services to fee payers and does not transfer funds to the Department.

While state budgeting and spending is an undoubtedly complicated subject, Plaintiffs' response demonstrates a deep misunderstanding of the process and ramifications of the various materials that they cite. This does not create any issues of material fact, because the facts are all laid out in the public record generated by the General Assembly.

Plaintiffs argue that CHASE does not make any supplemental payments to hospitals.[3] They believe SB 17-267 restructured appropriations for the Department, and argue that the General

[3] Plaintiffs attach Exhibit 6 with a footnote indicating that the document "purports to demonstrate CHASE payments to hospitals" but is inscrutable without additional information. Pls.' Resp. at 17 n.5. The document was prepared as a listing of all transactions out of the relevant accounts at the specific request of Plaintiffs' counsel in discovery. The source of the additional information they sought was a Department representative who was set for deposition. Plaintiffs' counsel canceled that deposition the day it was scheduled.

Assembly transferred funds out of CHASE and back to the Department to continue to make expenditures. Pls.' Resp. at 17. This is not what the Act accomplishes.

Senate Bill 17-267 does not transfer any funds anywhere. It deals only with appropriations—spending authority—not actual expenditures or transfers. The "constitution vests the General Assembly with authority to determine 'the *amount* of *state funds*' to be spent for particular purposes." *Colo. Gen. Assemb. v. Lamm*, 700 P.2d 508, 519 (Colo. 1985) (quoting *Anderson v. Lamm*, 579 P.2d 620, 626 (Colo. 1978)); *see also* § 24-75-112.5, C.R.S. (The appropriation clause is the "mechanism through which the General Assembly commonly authorizes state agencies to spend moneys"). Once the authority to spend a particular amount of money is set the executive branch, through the Governor, has "the authority to control 'how the money is to be allocated.'" *Colo. Gen. Assemb.* 700 P.2d at 519 (quoting *Anderson*, 579 P.2d at 626; citing COLO. CONST. art. IV, § 2). As with any other government funds, cash funds require spending authority before they can be spent. *Id.* at 522 (citing COLO. CONST. art V, § 33) (regarding appropriations and cash fund spending authority).

The General Assembly decreased the Department's spending authority for the Hospital Provider Fee Cash Fund by the amounts that the program had previously been authorized to spend after that program ended. S.B. 267 § 32(2), 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) [hereinafter S.B. 17-267]. It then appropriated spending authority to the Department from the new CHASE Cash Fund. § 32(3). The appropriation is the amount that CHASE is permitted to spend for its operations in that fiscal year. HCPF is the principal department housing the enterprise and is the correct level for the state budget appropriation. As the state appropriation act—the Long Bill—had been signed a month before, the CHASE bill was the only way to make the adjustment to spending authority. But the only way to understand *how* money has been spent is through the actual expenditures, which has been provided in evidence. State Defs.' MSJ, Ex. C.

The appropriation is only an expression of what CHASE may spend money on. For example, it is permitted to spend $3,794,276 for its share of maintaining the claims payment system[4]. *Id.* CHASE is authorized by statute to pay its administrative costs and to fund expansion populations, which is a benefit to hospitals as is described in the briefs. § 25.5-4-402.4(5)(b)IV), (VI), C.R.S.; State Defs.' Resp. at 8–11. The appropriation allows CHASE to pay its share of this overhead. While Plaintiffs complain that CHASE is paying expansion claims through the normal Medicaid claims payment system, any other outcome would make little sense. The annual total cost to maintain those systems is $45.22 million. Pls.' Resp., Ex 4 at 7.[5] To require CHASE to build a separate parallel claims payment system would be a waste of fee payer funds. Moreover, there is no bar against a government-owned business sharing existing government infrastructure.

Appropriating spending authority to a department for an enterprise is also not unique. For example, the Brand Board is a TABOR-exempt enterprise residing within the Department of Agriculture. § 35-41-101, C.R.S. It too has the authority to charge fees, a cash fund in which to place that fee revenue, and specific restrictions on how the revenue can be spent. §§ 35-41-102, -104. And, just like CHASE, its share of administrative overhead is appropriated to the department in which it is housed. H.B. 1322 § 2, Part I, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018) [hereinafter H.B. 18-1322]. Exhibit U at 3, 6.

The question is not what *spending authority* the enterprise has received, it is how it has *spent*

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[4] Called the Medicaid Management Information System (MMIS)

[5] It is unclear why subsection (e)(1) is highlighted on page 3 of the exhibit. The highlighted portion indicates that the cash funds cannot be severed from the source of the funds, i.e. CHASE, and the purpose of the appropriation and shall not be used for any other purpose. That section of the act supports the independence of CHASE and the restrictions on spending from the cash funds.

the funds.[6] The undisputed evidence before the Court shows that the Hospital Provider Fee program funds and CHASE funds have been spent providing services to the fee payers as authorized by statute. State Defs.' MSJ, Ex. C ¶¶ 7–13. With the exception of the transfers discussed in the motion and exhibit, no funds have been transferred to the State's General Fund. *Id.* "CHASE pays the expenses it incurs providing benefits and services, and for administration, out of the CHASE Cash Fund and not using state funds. CHASE has not paid for its expenses out of any other funds, and it has not used fee revenue to pay for anything not authorized under the statutes." *Id.* ¶ 11. CHASE collects the fee and matching federal funds, and uses that money to provide the full array of authorized services—including supplemental payments—to hospitals.

C. CHASE has financial separation from the Department.

Plaintiffs next argue that the appropriation "arrangement violates the essential operational independence that a TABOR-exempt enterprise must enjoy." Pls.' Resp. at 20. But that argument confuses the issues. The enterprise challenge in *Colorado Bridge Enterprise* had nothing to do with operational independence. 2014 COA 106 ¶¶ 47–68. Rather, that court examined independence in connection with the second *Bridge Enterprise* factor: the primary purpose for which revenue was raised and whether it was limited in purpose or went to the State's General Fund. ¶ 32.

In doing so, the *Bridge Enterprise* court identified as important that the charge could only be used for the particular purposes laid out in statute, that the enterprise and the department housing the enterprise had separate treasury accounts, that money from the fee never passed into or through the department's accounts or the General Fund, and that the enterprise and

[6] Contrary to Plaintiffs' claims, Senate Bill 18-195 did not change the manner of spending at all, specifying that the fees, "subject to annual appropriation by the General Assembly, *shall be expended by the enterprise* for the following purposes." S.B. 195 § 1, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018) (emphasis added).

department had separate financial reporting and administration. ¶¶ 5, 7, 32–33. Based on that, the court determined that the enterprise satisfied the second prong of the fee analysis. ¶ 34.

The facts in this case show that CHASE unquestionably has "operational independence" from the Department in every way identified as important by the *Colorado Bridge Enterprise* court. It has specific purposes for which the fee it collects can be spent; the fee is deposited in a separate cash fund that can only be spent for those purposes; the fee funds cannot be transferred into the General Fund, and have not been with limited exceptions; and CHASE and the Department have separate accounting and financial administration.[7] § 25.5-4-402.4(4)(a), (5)(a), (5)(b), C.R.S.; State Defs.' MSJ, Ex. C ¶¶ 5, 9–13. These facts support a finding that the CHASE Fee, and Hospital Provider Fee before it, are fees and not taxes.

D. The judgment Plaintiffs seek in this case would cripple the ability of government to function.

Plaintiffs claim that 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." Pls.' Resp. at 23. That is because, they believe, the "crippling government" language is only required in "the interpretation of TABOR's substantive provisions." *Id.* at 21. At the outset the "equally plausible interpretations" language they reference is to TABOR's rule of construction favoring that which would "reasonably restrain most the growth of government." *Barber*, 196 P.3d at 247; COLO. CONST. art. X, § 20(1).

In *Barber*, the supreme court rejected using that standard in evaluating a statute in the first instance. 196 P.3d at 247. Instead, it indicated that it has "consistently rejected readings of

[7] The same was true for the Hospital Provider Fee program. § 25.5-4-402.3(3)(a), (4)(a), (4)(b), C.R.S.; State Defs.' MSJ, Ex. C ¶¶ 5–8.

[TABOR] that would hinder basic government functions or cripple the government's ability to provide services." The supreme court then noted that "[a]rguably, requiring the state to return nearly half a billion dollars from the General Fund to the special cash funds would place a significant financial burden on the state. Under our rules of [TABOR] construction, we should require such a result only if the text of the amendment leaves us *no other choice*." *Id.* (emphasis added). That language, while obviously placed in the context of statutory interpretation, was certainly focused on the financial harm to the state of reversing course. In contrast to the half billion at stake in *Barber*, Plaintiffs brazenly ask for the return of $4.9 billion, Pls.' MSJ at 40, plus constitutional interest, which will bring the amount closer to $8.5 billion.

Plaintiffs claim that looking to the harm involved in a judgment is a "folly." Pls.' Resp. at 22. But it is no less so to consider that the amount Plaintiffs seek to recover represents 68% of the total General Fund available for state fiscal year 2017-18. Entering judgment for Plaintiffs based on their theory of TABOR would unquestionably "place a significant financial burden on the state" and "cripple the government's ability to provide services." In accordance with supreme court precedent, and with fidelity to the text of the amendment, this Court must avoid interpretations of TABOR that achieve this result.

III. The Excess State Revenues Cap did not have to be lowered.

Plaintiffs do not correctly capture the State Defendants' argument regarding the Excess State Revenues Cap. Both TABOR and Referendum C require that their applicable limits be adjusted when an enterprise is "qualified" or "disqualified." Colo. Const. art. X, § 20(7)(d); § 24-77-103.6(6)(b)(I)(B), C.R.S. There are two possible ways to read the term "qualified": (1) that an enterprise meets the constitutional requirements or (2) that a non-enterprise was turned into an enterprise. The limited cases to address the phrase do not address "qualify" in the sense of becoming, but rather "qualify" in the sense of meeting the constitutional requirements.

CHASE is a new entity. It did not exist prior to its creation by S.B. 17-267. The Hospital Provider Fee program, along with its advisory board, was also abolished. S.B. 17-267 §§ 16, 17. Plaintiffs dismiss these facts and attempt to create a new test, asserting that a "qualification" occurs when an "entity gains authority to collect a revenue stream that was previously subject to the [Excess State Revenues Cap]." Pls.' Resp. at 24. They claim that if two revenue streams are similar and drawn from the same class of persons or businesses, then they should be considered as the same revenue stream. *Id.* at 25.

They provide no authority for limiting the General Assembly's inherent authority in that way. The collection of two fees by different entities, even with substantial similarities, does not make the two entities one and the same, nor does it mean one was converted into the other. It does not account for the differences in the entities, their fees, or the services they provide.

Moreover, that argument finds no support in the text of the constitution. It "is within the exclusive province of the legislature to determine the necessity, expediency, wisdom, fairness and justness of the law enacted." *Musko v. Dunbar*, 309 P.2d 581, 583 (Colo. 1957). And thus, "[i]t is elementary that every regularly adopted legislative act is presumed constitutional, and that one attacking the validity thereof has the burden of showing it unconstitutional beyond a reasonable doubt." *Id.* (citations omitted). That, the Plaintiffs have not done. The General Assembly ended one program and created a separate and new enterprise to administer the CHASE Fee challenged here. Unlike previous cases when it turned a state function into an enterprise and adjusted the cap, it treated CHASE differently and created something new. It explicitly memorialized those facts in the legislation itself. Plaintiffs have not—and cannot—show that this act was outside the General Assembly's power, or that the Excess State Revenues Cap must be lowered.

Further, because the Hospital Provider Fee program revenue was not used in calculating the Excess State Revenues Cap, the cap need not be adjusted when the revenue is removed. State

Defs.' MSJ at 33–35. This is because as revenue used to set the limit must be removed in order to account for that revenue, the inverse is also true. Removing revenue that was not used to set the cap artificially lowers the cap by taking out revenue that was never included. Whether the Hospital Provider Fee revenue is eliminated in 2007 or in 2017, it does not change the permissible size of government as authorized by voters in Referendum C. *See* State Defs.' MSJ, Ex. E ¶¶ 6–21. The Excess State Revenues Cap is in exactly the same place it would have been regardless. *Id.* Ex. I. The General Assembly was right when it determined that the Excess State Revenues Cap need not have been adjusted.

IV. An act can satisfy single-subject scrutiny as long as it tends to effect or to carry out one general object or purpose.

The State Defendants do not agree with the "three-part test that Plaintiffs provided." Pls.' Resp. at 33. This is because it does not fully capture supreme court case law. The touchstone of the required analysis is whether the various methods in an act relate to a single subject or encompass multiple unrelated matters. As the supreme court has summarized, "[i]n order to constitute more than one subject under [the] caselaw pertaining to bills, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, and Submission Clause for "Public Rights in Waters II")*, 898 P.2d 1076, 1078–79 (Colo. 1995) (citing *People v. Sours*, 74 P. 167, 177 (Colo. 1903) (citation omitted); § 1-40-106.5(1)(e)(I); *Catron v. Cty. Comm'rs*, 33 P. 513, 514 (Colo. 1893)); *see also In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 2014 CO 66 ¶¶ 13–17. Accordingly, "if the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law." *Id.* (citations omitted). A court can, and should, examine a measure to see whether there is a "necessary connection" between its constituent parts that forms a "unifying or common objective" for the act. *Id.* at 1080.

The parties' other single-subject arguments are adequately argued in the principal briefing. The State Defendants have provided testimonial evidence and legislative history demonstrating how the provisions in S.B. 17-267 are connected to each other and to the single subject expressed in the title of the Act. Plaintiffs have not disputed any of those facts, and, as such, the materials have "establish[ed] the absence of an issue of fact." *McDaniels*, 186 P.3d at 88. The text of the Act, the legislative history, and the evidence provided to the Court all show that there is a single subject for the bill, which is supported by multiple methods.

Conclusion

There are no genuine issues of material fact in this case, and Defendants are entitled to judgment as a matter of law. The Hospital Provider Fee and CHASE Fee are charged to fee paying hospitals who receive services and benefits back in the form of supplemental payments, more insured patients, less uncompensated care, access to LTAC hospitals, and consulting services—benefits valued at billions of dollars more to hospitals than they pay in fees. Plaintiffs are not the fee payers and do not have standing to challenge these programs. CHASE meets the constitutional enterprise requirements, and its creation did not command lowering the Excess State Revenues Cap. The bill creating CHASE provided critical relief to rural Colorado through connected methods all supporting that objective.

While Plaintiffs have complained and criticized, they have not proved that they have standing to pursue this case. Nor have they challenged any of the facts advanced by the State Defendants or demonstrated that there are any triable issues of fact. Considering all of the undisputed facts as true, the State Defendants are entitled to dismissal or summary judgment on every claim in this case. Accordingly, the State Defendants respectfully ask the Court to enter summary judgment in their favor.

Dated: August 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2018, I served a true and correct copy of the foregoing REPLY IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT to each of the following persons through Colorado Courts E-Filing, copied to pro hac vice counsel by email:

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