303 831 6411 / 866 578 0936
303 860 8175
www.cml.org
1144 Sherman St., Denver, CO 80203

2022-2023 Survey of Local Government Law

October 6, 2023

Robert Sheesley, General Counsel
Colorado Municipal League
rsheesley@cml.org

This outline contains a review of selected appellate decisions of interest to municipal attorneys from the Colorado Supreme Court and Court of Appeals, the Tenth Circuit Court of Appeals, and the United States Supreme Court, reported during the period September 17, 2022, through October 3, 2023.

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Appendix 1: CML Amicus Participation 2022-2023

Appendix 2: Order in *City and County of Denver et al. v. Polis*

1. Criminal Justice

Warrantless search of backpack not justified by community-caretaking rationale
U.S. v. Braxton, 64 F.4th 830 (10th Cir. 2023)

Officers found a gun in a backpack carried by a defendant seen selling drugs, but the backpack was not implicated in the crime. To prevent the exclusion of evidence from the search, the government later argued that the backpack would have been impounded and searched under a community-caretaking rationale to protect the defendant's property. The Tenth Circuit Court of Appeals rejected that argument because the backpack was not implicated in the crime and the defendant did not consent. Most importantly, the officers, an alternative to impoundment, could have given the backpack to a bystander identified by the defendant as his "girl" even though the defendant did not ask them to.

Suspect surrendered expectation of privacy in abandoned backpack
U.S. v. Porter, 66 F.4th 1223 (10th Cir. 2023)

Police arrested a shooting suspect at his workplace after seeing him carrying a backpack. The suspect declined to bring any personal items and denied having any personal belongings, including a backpack. Police found the backpack away from the suspect's workstation, and another employee confirmed that it was the suspect's. Police seized the backpack at the employer's urging and found a handgun. The Tenth Circuit Court of Appeals held that the suspect had abandoned the bag and surrendered any expectation of privacy.

Trooper did not unlawfully prolong a traffic stop by engaging in routine tasks
U.S. v. Cates, 73 F.4th 795 (10th Cir. 2023)

State troopers performing drug interdiction work lawfully pulled over an SUV for speeding. During the stop, the trooper waited for the driver to locate his rental agreement, cleared the driver's out-of-state license, and checked the driver's criminal history. Also during this time, the trooper twice requested a K-9 officer, who arrived and conducted an open-air sniff while the trooper completed the criminal history search and paperwork. The Tenth Circuit Court of Appeals held that the trooper did not unlawfully prolong the traffic stop and was diligently engaged in routine tasks during the three minutes from the stop to the K-9 officer's arrival.

Protective sweep justified by slow stop and furtive movements
U.S. v. Canada, 76 F.4th 1304 (10th Cir. 2023)

Pulling over a vehicle in a high crime area for a failure to signal, Wichita police noticed that the driver to longer than usual to stop and reached behind his seat. Officers removed the driver and conducted a protective sweep of the vehicle, discovering a pistol that the driver – a felon – was prohibited from possessing. The Tenth Circuit Court of Appeals rejected the driver's claim that the warrantless search was unconstitutional. The court held that the officer's reasonable suspicion relied on more than the driver's furtive

movements. The driver's slight delay in stopping worked with movements to justify the officer's perception.

Vehicle condition did not support prolonged traffic stop
U.S. v. Leon, --- F.4th ---, 2023 WL 5838456 (10th Cir. Sept. 11, 2023)

Stopping a vehicle for driving in the left lane, a state trooper believed the driver was trafficking drugs and prolonged the traffic stop to allow a canine unit to arrive. The Tenth Circuit Court of Appeals held that evidence from the stop, including seventy-six pounds of methamphetamine, should have been suppressed. The court criticized the district court's finding that the officer developed reasonable suspicion from circumstances of the stop, including the messy interior condition of the car, the driver's cooperation, and unusual but not logistically unrealistic travel plans.

Tenth Circuit reaffirms federal ban on felon's possession of firearms
Vincent v. Garland, --- F.4th ---, 2023 WL 5988299 (10th Cir. Sept. 15, 2023)

A prisoner challenged the federal ban on felons' possession of firearms under the new "historical tradition" standard established by *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*. Re-assessing its decision in *U.S. v. McCane* (2009) that the prohibition remained lawful under *District of Columbia v. Heller* (2008), the Tenth Circuit Court of Appeals noted *Bruen*'s discrete exception of felon dispossession statutes and apparent support for criminal background checks in connection with non-discretionary permitting regimes. The court reaffirmed *McCane* and held that *Bruen* did not require individualized determinations for firearm possession.

Driver's safe lane change undermined reasonable suspicion
People v Barrera, 517 P.3d 61 (Colo. 2022)
People v Deaner, 517 P.3d 66 (Colo. 2022)

A trooper stopped a vehicle for changing lanes in front of him in a way that left less than three seconds of travel time between the vehicles, in violation of a guideline in the Colorado Driver's Handbook. The trooper had been following the vehicle from the left lane under the suspicion of drug trafficking and the vehicle had changed lanes to make room for an emergency vehicle on the shoulder. Affirming the suppression of drug evidence recovered from the vehicle during the stop, the Colorado Supreme Court held that the lane change was safe, in the context of C.R.S. § 42-4-1007, under the totality of the circumstances and did not provide reasonable suspicion for the trooper to stop the vehicle. The Court believed that the requirement to change lanes safely was not ambiguous and rejected the attempt to rely on the handbook's rule, which did not interpret the statute in question.

"Psychological coercion" violated 5th Amendment
People v. Smiley, 530 P.3d 639 (Colo. 2023)

While collecting a suspect's DNA samples and prints pursuant to a court order, detectives provided a *Miranda* advisement but also told the suspect that he was not in

trouble and would be leaving the police station that day. The suspect confessed to a homicide during the ensuing interrogation. The Colorado Supreme Court, in a 4-3 decision, held that the confession of the teenager experiencing homelessness was not voluntary due to the detective's "psychological coercion" in providing false assurances about his freedom. The Court noted that the detectives had reasonable grounds to believe the suspect had committed the murder and made affirmative misrepresentations to trick the suspect after his demeanor changed when advised of his *Miranda* rights.

Complex investigation into serious traffic collision supported longer investigatory stop
People v. White, 531 P.3d 397 (Colo. 2023)

A DUI defendant successfully suppressed evidence of his consensually-provided blood sample at the scene of an accident. The trial court believed that officers asked for consent after unreasonably extending the investigatory, having no indication the defendant was intoxicated and having already determined that they were done questioning him. Reversing, the Colorado Supreme Court held that the officers did not exceed the scope and character of the investigatory stop and transform it into an arrest. The complex investigation of a serious collision was "fluid and remained in progress." The defendant was asked for consent only thirty minutes into the investigation and officer's were delayed for over an hour as they accommodated the defendant's request to speak to his mother.

Continuous video monitoring did not constitute a search
People v. Woodyard, --- P.3d ---, 2023 WL 5964088 (Colo. App. Sept. 14, 2023)

Police mounted three video cameras on telephone poles near a suspect's apartment building, including one on a telephone pole. For seven weeks, the camera recorded the street and sidewalk in front of the building and some grass in front of the suspect's unit, but no part of the unit or building. Rejecting the suspect's argument that this was an unconstitutional warrantless search, the Colorado Court of Appeals held that the long-term, continuous surveillance of the public street and sidewalk was not a constitutionally-cognizable search. The suspect lacked any reasonable expectation of privacy in the area.

2. Courts

COVID courtroom closure during jury selection did not violate 6th Amendment
U.S. v. Veneno, --- F.4th ---, 2023 WL 5921331 (10th Cir. Sept. 12, 2023)

During jury selection, a district court removed the public from the courtroom but provided an audio, then both audio and video, feed for the public to view. Following *Waller v. Georgia* (1984), the Tenth Circuit Court of Appeals held that the trial court actions timely assessed the closure after the defendant objected and the defendant never objected to the audio-only feed. The court's total closure was justified to achieve social distancing during the pandemic, particularly because potential jurors would have been seated in the gallery. The court did not determine whether providing an audio or video feed resulted in a partial or total closure.

Firefighter union permitted to seek intervention in consent decree action
State ex rel. Weiser v. International Association of Firefighters, --- P.3d ---, 2023 WL 3875030 (Colo. App. June 8, 2023)

After the Colorado Attorney General investigated the City of Aurora's police and fire departments pursuant to Senate Bill 20-217, the state filed an action against the city to implement a negotiated consent decree. The district court did not permit intervention by the International Association of Firefighters, Local 1290. The Colorado Court of Appeals held that C.R.S. § 24-31-113 did not bar permissive intervention under C.R.C.P. 24. However, the court affirmed the district court's decision that the union could not intervene as a matter of right, rejecting claims that the union had an interest in indirect reputational effects or issues touching management rights reserved to the city.

Livestream didn't justify courtroom closure under 6th Amendment
People v. Bialas, --- P.3d ---, 2023 WL 3875093 (Colo. App. June 8, 2023)

After jurors overheard spectators discussing a pending case, the court barred spectators and made the proceedings available via live video and audio streams. The Colorado Court of Appeals held that the removal of the defendant's family was an unjustified nontrivial partial closure of the courtroom that violated her right to a public trial under the Sixth Amendment to the U.S. Constitution and article II, section 16 of the Colorado Constitution. The livestream did not permit the court and parties to be in the presence of interested spectators. Failing the standard of *Waller v. Georgia* (1984), the closure was based on the misbehavior of a few spectators and there was no prior warning.

Statute of limitations period does not extend to following business day
Gomez v. Walker, --- P.3d ---, 2023 WL 5963716 (Colo. App. Sept. 14, 2023)

Because the third anniversary of a car wreck fell on a Saturday, a plaintiff waited until the following Monday to file suit. The Colorado Court of Appeals held that the three-year statute of limitations for certain tort actions under C.R.S. § 13-80-101 was not affected by C.R.S. § 2-4-108(2). The latter, as a general provision that extends statutory periods ending on a holiday, had to yield to the statute of limitations that was more specific. The statute of limitations described a period that began on the date the cause of action accrued and ended three years after the cause of action accrued "and not thereafter." Because of the "not thereafter" provision, the statutes could not be harmonized and the more specific provision prevailed.

Court of Appeals interprets new records sealing statutes
People v. C.H., --- P.3d ---, 2023 WL 6300007 (Colo. App. Sept. 28, 2023)

Recent legislation has expanded the types of criminal records eligible for sealing and the process for sealing records but has maintained restrictions on sealing records of offenses involving an underlying factual basis of domestic violence. A defendant sought to seal a decade-old misdemeanor conviction for harassment and a deferred judgment for trespass that was dismissed. The Colorado Court of Appeals held that the harassment

conviction would have been ineligible for sealing under C.R.S. § 24-72-706(2)(a), but that the trial court could still seal the record under C.R.S. § 24-72-706(2)(b) if the court found that, by clear and convincing evidence, the defendant's need for sealing is significant and substantial, the passage of time is such that the defendant is no longer a threat to public safety, and disclosure of the record is no longer necessary to protect or inform the public. The trespass deferred judgment was also ineligible for sealing because of the related misdemeanor conviction. The court also held that the term "conviction" in the sealing statutes did not include a successfully completed deferred judgment and that the ineligibility and so the inability to seal the trespass offense would not affect the ability to seal the harassment conviction under C.R.S. § 24-72-701(12)(a)(I).

3. Employment

FLSA executive exemption limited for workers paid at daily rates
Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39 (2023)

An oil rig worker's claim for overtime under the Fair Labor Standards Act challenged his classification as an exempt executive employee. The worker was paid weekly, but on a daily rate basis by which he was entitled to a certain amount for each day worked. Under Department of Labor regulations, executives must be compensated on a salary-basis at a rate of not less than $455 per week and, except for highly-compensated employees, perform certain duties. The Supreme Court rejected the employer's classification because the worker's salary depended on a daily, not weekly, rate. The worker also did not fit an alternative standard that allowed for computation on a less-than-weekly basis that required a guarantee of a certain weekly payment approximating the worker's typical weekly wage (29 C.F.R. 541.604(b)).

Union could be subject to state tort claims relating to work stoppage
Glacier Northwest, Inc. v. Int'l Brotherhood of Teamsters, 598 U.S. 771 (2023)

During a labor dispute, drivers of concrete trucks initiated a work stoppage in the middle of a workday, causing the loss of product and carrying a risk of damage to trucks. The Supreme Court held that the National Labor Relations Act did not preempt Washington tort claims against the union by an employer. The Court relied on prior holdings that the NLRA does not shield strikers who fail to take "reasonable precautions" to protect employer property from foreseeable, aggravated, and imminent danger from sudden cessation of work.

High burden to establish "undue hardship" of religious accommodation
Groff v. DeJoy, 600 U.S. 447 (2023)

The United States Postal Service (USPS) imposed progressive discipline on an employee who refused to work Sundays for religious reasons. The employee filed a Title VII claim, contending that the USPS could have accommodated his practice without undue burden. Following *Trans World Airlines, Inc. v. Hardison* (1977), the lower courts held that the USPS was not required to provide a religious accommodation that would impose a burden that was more than *de minimis*. Reversing, the Supreme Court clarified

that the "undue hardship" defense to a Title VII religious accommodation claim requires the employer to show substantial increased costs in relation to the conduct of the particular business, and that impacts on other employees without a connection to an impact on the business or other employee's views of religion will not suffice.

Non-specific employee grievance petition not a matter of public concern
Rogers v. Riggs, 71 F.4th 1256 (10th Cir. 2023)

Responding to discipline for having illegal drugs and weapons at work, a jail employee quit and claimed that the search that uncovered the contraband was retaliation for her drafting and circulating a petition criticizing treatment of jail employees. The Tenth Circuit Court of Appeals held that the petition – containing vague statements of wrong-doing, harassment, retaliation, and a lack of training – did not contain speech creating a public concern, leading to the defeat of the First Amendment retaliation claim. The lack of specificity and general grievances, disconnected to any illegal conduct or safety issue, meant that the petition concerned private matters that were not entitled to First Amendment protections.

Additional compensation can be computed less-than-weekly for FLSA exemption
Wilson v. Schlumberger Technology Corporation, --- F.4th ---, 2023 WL 5839557 (10th Cir. Sept. 11, 2023)

An oilfield services worker challenged his classification as an exempt employee under the Fair Labor Standards Act. The employee was paid a bi-weekly base salary plus variable hourly compensation that was typically greater than his base salary. The district court considered the calculation of both elements of compensation and determined that the employee would be treated under 29 C.F.R. 541.604(b), which allows computation of salary on a less-than-weekly basis if the employee is guaranteed a certain weekly payment approximating the worker's typical weekly wage. The Tenth Circuit Court of Appeals reversed and held that employee's additional compensation should have been treated under 29 C.F.R. 541.604(a), which required only the minimum weekly-required salary and did not disqualify an employee from the exemption due to fluctuation in the additional compensation.

Unexplained injury in the workplace found compensable
King Soopers v. Industrial Claims Appeals Office, --- P.3d ---, 2023 WL 4938513 (Colo. App. Aug. 3, 2023)

In this worker's compensation case, a grocery store employee was walking in the store while carrying a box and "felt a 'pop' in his right knee," tearing his meniscus and spraining a ligament. The administrative law judge held that the injury was compensable, despite the unknown nature of the cause of the harm. Applying *City of Brighton v. Rodriguez* (2014), the Colorado Court of Appeals held that an employee can meet the burden of proof for and "unexplained injury" as long as the injury originated in a work-related function and was not due to a pre-existing condition or other "personal risk."

4. First Amendment

CADA cannot compel web designer to create website
303 Creative, LLC v. Elenis, 600 U.S. 570 (2023)

The Colorado Anti-Discrimination Act (CADA) prohibits public accommodations from denying full enjoyment of their goods and services based on certain protected traits, including sexual orientation. The Supreme Court viewed customized wedding websites as a form of "pure speech" of their creator and that, by mandating the creation of a website for a gay couple's wedding, CADA would have required speech that the web designer would not have wanted to make. The Court held that Colorado's interest in ensuring equal access to public accommodations did not override the First Amendment in this case.

"True threat" speech requires subjective element to be criminalized
Counterman v. Colorado, 600 U.S. 66 (2023)

Colorado's stalking statute (C.R.S. § 18-3-602(1)(c)) includes a prohibition on repeated communications made "in a manner that would cause a reasonable person to suffer serious emotion distress," that cause such distress. A social media user was charged under the statute after he sent hundreds of messages to a local musician that caused her fear for her life. Reversing the conviction that was based on an objective standard, the Supreme Court held that for speech to be a "true threat" and lose First Amendment protections, the speaker must consciously disregard their subjective understanding that their speech would be viewed as threatening violence (*i.e.*, recklessness).

Paid-for signage law held to be content-neutral under *Reed v. Town of Gilbert*
StreetMediaGroup, LLC v. Stockinger, 79 F.4th 1243 (10th Cir. 2023)

In 2021's Outdoor Advertising Act, Colorado changed its approach to permitting advertising devices from an off-premise/on-premise distinction to one based on whether compensation was paid or earned for the signage. Billboard companies challenged the law's constitutionality under the First Amendment as failing strict scrutiny under *Reed v. Town of Gilbert* (2015), as well as vagueness and equal protection claims. The Tenth Circuit Court of Appeals affirmed the dismissal of the First Amendment claim because it viewed the law's distinctions as based on compensation, not content, and the companies failed to allege that the law failed to survive intermediate scrutiny, although it was skeptical of the government's justifications. The court also held that the law was not unconstitutionally vague and that plaintiff failed to state a plausible equal protection claim given Colorado's legitimate interests in safety and reducing visual clutter.

Refusal to make a plain cake celebrating gender transition violates CADA
Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926 (Colo. App. 2023), cert. granted

A bakery accepted an order for a pink birthday cake with blue frosting but then declined to make it when the customer explained that it was to celebrate her gender

transition. The Colorado Court of Appeals determined that the baker's refusal violated the Colorado Anti-Discrimination Act, given that the baker declined to make it only after knowing its purpose. Because the cake was not inherently expressive, there was no compelled speech and the baker was not unlawfully restricted in the free exercise of his religious beliefs.

The Colorado Supreme Court granted certiorari in early October to review the following questions:

(1) Whether the CADA claim is barred because Scardina did not appeal the Commission's dismissal of the administrative complaint before suing.

(2) Whether the decision by not to create a pink cake with blue frosting that was to be used to celebrate a gender transition violated CADA's prohibition on transgender-status discrimination.

(3) Whether the decision not to create a pink cake with blue frosting that was to be used to celebrate a gender transition was protected by the First Amendment.

No First Amendment right to protest loudly outside abortion clinic
Harmon v. City of Norman, 61 F.4th 779 (10th Cir. 2023)

After being cited for disturbing the peace, "sidewalk ministry" practitioners that demonstrated outside of abortion clinics challenged the ordinance's prohibition on "playing or creating loud or unusual sounds" as violating the Free Speech and Free Exercise clauses of the First Amendment. The Tenth Circuit Court of Appeals affirmed the ordinance's constitutionality and rejected the demonstrators' facial and as-applied claims. The speech claims failed because the law was content neutral and advanced a significant interest in protecting against unwelcome noise. The narrowly tailored law did not stop them from using elevated volumes. As the ordinance was neutral and generally applied, the Free Exercise claim failed under a rational basis standard.

Candidate's claims against social media impersonator overcome anti-SLAPP motion
Rosenblum v. Budd, --- P.3d ---, 2023 WL 4938545 (Colo. App. Aug. 3, 2023)

After an impersonation Twitter account posted a link to a distasteful blog, the impersonated city council candidate filed suit for misappropriation, defamation, and civil conspiracy. The defendants sought to dismiss the claims of misappropriation, defamation, and civil conspiracy under Colorado's anti-SLAPP statute. The Colorado Court of Appeals determined that the candidate established a reasonable probability of success on the defamation and misappropriation claims, particularly as the Twitter account deprived the candidate of the use of that name. However, the court held that the defendant's partial success in dismissing the conspiracy claim entitled him to attorneys fees because the partial success was not insignificant and achieved a practical benefit for the defendant.

Statements in Title IX proceeding not absolutely immune from defamation claim
Gonzalez v. Hushen, --- P.3d ---, 2023 WL 6301610 (Sept. 28, 2023)

After a Title IX investigation into accusations that he sexually harassed other students, a student was expelled and tried, but not convicted, of related offenses. Because the student might have returned to the school, the original accusers were notified and their mothers submitted written statements. The school reopened the investigation and attorneys representing the accusers submitted additional statements. The student filed a defamation claim and the defendants moved to dismiss under Colorado's anti-SLAPP lawsuit. The Colorado Court of Appeals considered the nature of immunity and quasi-judicial proceedings, determining that, although the lack of procedural safeguards isn't necessary for a proceeding to be quasi-judicial, absolute immunity could not be provided without them. Because the Title IX proceeding lacked such safeguards, the defendants could not claim immunity.

5. Governmental Immunity

New cause of action for time-barred sexual assault claims held unconstitutional
Aurora Public Schools v. A.S., 531 P.3d 1036 (Colo. 2023)

The Child Sexual Abuse Accountability Act enacted in 2021, among other things, created a three-year window to bring claims of under a new cause of action for sexual abuse occurring between 1960 and 2022 relating to youth-related activities for programs, even if previously time-barred. The Colorado Supreme Court held that the new cause of action violated the constitutional prohibition on retrospective legislation, where a previously-available cause of action would have been time-barred. The Court rejected a "public policy exception" to the clear constitutional prohibition that would have allowed the General Assembly to ignore constitutional limits "simply by proclaiming that the law serves a legitimate government interest."

CGIA notice period began when plaintiff admitted knowledge of injury and causation
Adams County Housing Authority v. Panzlau, 527 P.3d 440 (Colo. App. 2022), cert. denied

In response to a public housing authority's eviction, a tenant asserted a negligence counterclaim based on mold exposure. The Colorado Court of Appeals affirmed dismissal for lack of subject matter jurisdiction because the tenant provide the written notice of claims required by C.R.S. § 24-10-109 more than 180 days after her discovery of the alleged damages and injuries. The court held that the notice period ran as early as her written complaints to the authority about mold, and not her final day of exposure. The court also confirmed that no *Trinity* hearing was required when there was no factual dispute concerning the lack of timely notice.

6. Open Records

"Person in interest" not entitled to municipality's privileged material
DiPietro v. Coldiron, 523 P.3d 1019 (Colo. App. 2022)

In an interlocutory appeal, the Colorado Court of Appeals reversed a trial court decision that granted a former municipal employee access under the Colorado Open Records Act to records discussing her employment that subject to the attorney-client and deliberative process privileges. First, the court construed C.R.S. § 24-72-204(3)(a) to require disclosure to a "person in interest" only where specifically provided for a specific category of records; neither provision restricting disclosure based on these privileges authorized the disclosure. Second, the court held that disclosure of privileged materials to the subject of the records would produce an absurd result.

CML filed an amicus brief in the Court of Appeals.

Defendant must satisfy *Spykstra* test in assault on peace officer case
People v. Cline, 525 P.3d 303 (Colo. 2022)

A defendant accused of assault on a peace officer claimed that the court should have conducted an *in camera* review of his arresting officer's personnel files before quashing his subpoena. The Court of Appeals reviewed the test for third-party subpoenas in criminal cases under *People v. Spykstra* (Colo. 2010), and rejected the attempt to obtain records of excessive force or dishonesty. The defendant could not show a reasonable likelihood that the subpoenaed material existed, as required by *Spykstra*'s first factor. Without that initial showing, the *in camera* review was not required.

No "litigation exception" to CORA
Roane v. Archuleta, 526 P.3d 220 (Colo. App. 2022), petition for cert. pending

During litigation over an Open Meetings Law violation, the plaintiff submitted an open records request to the defendant, Archuleta County, for a meeting recording that he intended to use in the litigation. The Colorado Court of Appeals rejected the county's argument that C.R.C.P. 34 and the holding in *Martinelli v. District Court* (Colo. 1980) were rules and orders of the Supreme Court that prohibited disclosure under C.R.S. § 24-72-204(1)(c). The reason for the request was irrelevant and neither CORA nor Supreme Court rules or precedent precluded a litigant from using CORA to obtain documents that would be used in litigation. The court highlighted the lack of a litigation exception in CORA and its limitation on attorney's fees in cases where the records relate to pending litigation and are discoverable.

Cost and officer safety supported discretionary denial of decertified officer list
Gazette v. Bourgerie, 533 P.3d 597 (Colo. App. 2023)

The Peace Officer Standards and Training Board (POST) rejected a request for information on the decertification of peace officers, pursuant to Colorado's Criminal Justice Records Act, C.R.S. § 24-72-301 *et seq*. The Court of Appeals first held that POST was a "criminal justice agency" because the definition included any agency performing

"any activity directly relating . . . [intermission] . . . the collection, storage, or dissemination of arrest and criminal records information" and POST collected and stored records an officer's criminal case information that might result in decertification. Second, the court held that the custodian's discretionary denial of the request was supported because the creation of a list as requested would be "exceedingly time-consuming" and that disclosing officer names would threaten undercover officer safety and investigations.

7. Elections

Failure to include second majority-minority district violated Voting Rights Act
Allen v. Milligan, 591 U.S. 1 (2023)

Alabama's 2021 congressional redistricting map followed its 2011 map, creating only one majority-minority district. The Supreme Court determined, under the framework of *Thornburg v. Gingles* (1986), that the map likely violated Section 2 of the Voting Rights Act in impermissibly diluting minority voting strength. Black voters could have constituted a majority in a second, reasonable district under alternative maps. The Court discounted the state's argument that the Gulf Coast region could not be split, even if it was a traditional community of interest. The Court upheld the Court's determination that there was no serious dispute that Black voters were politically cohesive or that majority votes in the districts under the challenged map would usually defeat Black voters preferred candidate. The Court also declined to adopt a "race-neutral benchmark" theory, while also relying on precedent and traditional districting principles to avoid elevating race to an impermissible level.

This summer, Alabama's legislature then drafted a new map – again including only one majority-minority district – that was rejected by the district court. The Supreme Court declined to intervene.

Mayor and councilmember can be "separate offices" for term limits purposes
Salazar v. Kulmann, 521 P.3d 649 (Colo. 2022)

Article XVIII, section 11(1) of the Colorado Constitution limits local elected officials to two consecutive terms of office. The mayor of the City of Thornton, a home rule municipality with no local term limits provision, previously served 1.5 terms as a councilmember before being elected mayor. When a constituent challenged the mayor's eligibility during her mayoral term, the district court held that the offices of mayor and council in that city were the same "office" but that the partial term as councilmember did not count. The Supreme Court reversed, holding that the term limits amendment unambiguously referred to a specific office and that the offices of mayor and councilmember were separate and distinct under the Thornton charter and code. The Court declined to decide whether the district court erred in holding that the mayor's partial term did not count as a term.

CML filed an amicus brief in the Supreme Court.

Bill and ballot title challenge rejected for subject matter jurisdiction
Ward v. State of Colorado, 534 P.3d 107 (Colo. 2023)

The Colorado Supreme Court rejected a constitutional challenge to Senate Bill 23-303 and its related referred measure, "Proposition HH." The Court applied the single subject requirement of Article V, Section 21 of the Colorado Constitution ("No bill . . . shall be passed containing more than one subject, which shall be clearly expressed in its title.") to both challenges. The Court never reached the single subject question and held, in line with longstanding precedent, that the courts lacked subject matter jurisdiction to review the question until (and if) voters approved Proposition HH. The Court held that the Proposition HH ballot title did not violate the "clear expression" requirement (that applies to bill titles). Notably, the challengers brought their claims under C.R.S. § 1-11-203.5, which requires a challenge to "the form or content of any ballot title" to be filed within five days after the title is set.

8. Police Civil Liability

Takedown of nonviolent misdemeanor suspect was excessive, despite conviction
Surat v. Klamser, 52 F.4th 1261 (10th Cir. 2022)

While *Heck v. Humphrey* (1994) stands for the proposition that a Section 1983 claim cannot proceed based on actions that would render an underlying conviction invalid, an excessive force claim is not inconsistent with a conviction for resisting arrest. Here, an officer held a suspect by the wrist to stop her as she attempted to leave the scene of a disturbance at a bar. When the suspect, a 115-pound woman, tried to pry the officer's fingers off and grabbed his arm. In response, the officer, who was larger than the woman, took the suspect to the ground, causing a concussion and other injuries.

Although the woman was convicted of resisting arrest and obstructing a peace officer, the Tenth Circuit Court of Appeals held that the officer was properly denied qualified immunity at the summary judgment stage. The officer failed to identify facts in the complaint that would be inconsistent with the underlying convictions. Further, the low-level offense and lack of imminent danger favored finding that nothing more than minimal force was reasonable in response to her slight resistance.

Destruction of tailor shop by police did not support substantive due process claim
Mahdi v. Salt Lake City Police Department, 54 F.4th 1231 (10th Cir. 2022)

A vehicle pursuit ended when the suspect's car crashed into a tailor's shop, and the police fired "scores of bullets" at the vehicle. The shop owner filed a Section 1983 suit, alleging that the excessive use of force violated his substantive due process rights when it destroyed his store and inventory. The Tenth Circuit Court of Appeals considered whether the officers' conduct "shocked the conscience" under a test that evaluates whether the officers had an opportunity to deliberate. Because the officers did not have the opportunity to deliberate before firing their weapons, the lack of an alleged intent to harm meant that the conduct could not sustain the claim. Had the officer's been able to deliberate, they could have been culpable under a deliberate indifference standard.

Traffic stop of sexual harassment victim violated clearly established law
Shepherd v. Robbins, 55 F.4th 810 (10th Cir. 2022)

A Utah highway patrolman worked with a commercial towing company's employee to administer a towing program. The employee claimed that, after he sent her some flirtatious texts, the patrolman thought it would be a good idea to pull her over on the highway to say hello, as a "joke." The Tenth Circuit Court of Appeals reversed the district court's grant of summary judgment for the patrolman. The court held that the patrolman had fair notice that a traffic stop, without reasonable suspicion of criminal activity, violated clearly established law even if it was a consensual encounter. However, the texts did not violate clearly established law in the commercial relationship between the highway patrol and towing vendor, notwithstanding the patrolman's position of authority.

Recalcitrant driver justifies use of force
Helvie v. Jenkins, 66 F.4th 1227 (10th Cir. 2023)

During a nighttime traffic stop based on speeding, turning without a signal, and stopping past a stop sign, a deputy smelled marijuana and believed the driver to be under the influence. After the driver rolled up his window and refused to exit the vehicle, the deputy observed a handgun in the door's pocket while pulling the driver from the vehicle. The driver suffered fractured ribs when the deputy kneeled on his back. In the Tenth Circuit Court of Appeals applied *Graham v. Connor* (1980) to both before and after the gun was discovered and, despite the limited severity of the suspected offenses, found that in each circumstance the level of force used was justified. As a result, the deputy was entitled to qualified immunity because the driver failed to show that the deputy violated any constitutional right as of August 2018.

No immunity for off-duty officer's egregious conduct in road rage incident
Rosales v. Bradshaw, 72 F.4th 1145 (10th Cir. 2023)

An off-duty New Mexico police officer followed another driver home, blocking the driver's car in and never identifying himself as law enforcement. The officer then pointed his gun at the driver, who had exited his car with a lawfully-carried gun in his pocket. The district court held that the officer did not violate clearly established law, but the Tenth Circuit Court of Appeals found the "egregious and unlawful conduct" to be "obviously unconstitutional.

Tasing to secure cell phone evidence not an excessive use of force
Andersen v. DelCore, 79 F.4th 1153 (10th Cir. 2023)

When Colorado Springs police attempted a warrantless seizure of a cell phone that could have contained evidence of child abuse, officers engaged in a lengthy argument with the person holding the phone and one officer ultimately grabbed his arm and later tased him during a struggle. In the resulting civil rights action, the district court held that one officer was not entitled to qualified immunity because he escalated the need for force and gave the father no chance to comply. In the Tenth Circuit Court of Appeals reversed and held that the officer's use of force was reasonable. Grabbing the man's arm was a

minor use of force to conduct a lawful warrantless seizure in connection with a serious crime and tasing was reasonable because the man appeared to be overpowering the officer.

Immunity for claim seeking return of lawfully seized property
Woo v. El Paso County Sheriff's Office, 528 P.3d 899 (Colo. 2022)

A convicted and sentenced offender brought a replevin action against the El Paso County's Sheriff's Office seeking the return of lawfully seized property. The lower courts held that the Colorado Governmental Immunity Act barred the replevin claim, and the Colorado Supreme Court agreed. The court held that the offender had a remedy by filing a timely motion in the criminal trial court. As a result, the offender's due process rights were not violated.

9. Taxation and Finance

Retention of excess tax sale proceeds held to be a "classic taking"
Tyler v. Hennepin County, 589 U.S. 631 (2023)

Minnesota's tax sale statute provided that an owner abandoned their property by failing to pay taxes and permitted the state to retain, after recovering the tax debt, any excess proceeds from a tax sale. The Supreme Court unanimously held that the state could not use the tax debt to take more property than was due and effected a "classic taking," appropriating private property for government use. The Court rejected the argument that state-imposed conditions on property ownership could override the constitutional protection of the Takings Clause. The Court concluded, "The taxpayer must render under Caesar what is Caesar's, but no more."

Cities cannot tax cigarettes and share state tax revenue
City of Aurora v. Colorado Department of Revenue, 529 P.3d 1254 (Colo. App. 2023)

Colorado's cigarette sales tax revenue is shared with local governments, as long as the local government's doesn't impose "taxes on any person as a condition for engaging in the business of selling cigarettes." C.R.S. § 39-22-623(1)(a)(II)(A). That limitation was narrowed by 2019 legislation from a broader restriction that prohibited a local share if there were local "fees, licenses, or taxes on any person as a condition for engaging in the business of selling cigarettes" and taxes on cigarettes.

The City of Aurora imposed a cigarette tax, highlighting an apparent ambiguity in and arguing that the sales tax was not an occupation tax. Relying heavily on legislative history of the 2019 law and phrasing elsewhere in the statute, the Colorado Court of Appeals agreed that the statute was ambiguous but was intended to prohibit all local government cigarette taxes. The court was not persuaded to read the statutory provision as being limited to occupation taxes.

Statutory exemption from home rule taxes on construction materials invalidated
City and County of Denver, City of Boulder, City of Commerce City, City of Pueblo, and City of Westminster v. State of Colorado and Jared Polis, No. 2022CV31841 (District Court,

City and County of Denver) (Order on Motion for Partial Judgment on the Pleadings, November 23, 2022) (See Appendix 2)

In 2022, the General Assembly enacted House Bill 22-1024, which granted an exemption from home rule municipalities' sales and use taxes as applied to construction materials used in school construction, C.R.S. § 39-26-708(2.5). Five municipalities challenged the law as an unconstitutional infringement on home rule taxing authority under Article XX of the Colorado constitution. The trial court granted the cities' motion for judgment on the pleadings, rejecting the state's request for discovery. The trial court rejected the state's argument that the cities were taxing education and determined that the state's interests in education were not sufficiently and directly linked to justify the exemption of a third-party transaction.

The trial court then analyzed the statute under *Denver v. State* (Colo. 1990) after determining that sales and use taxes, in some cases, be a matter of mixed state and local concern. The trial court determined that sales and use taxes on materials purchases by private contractors was a matter of local concern and that the statute was an unlawful infringement on the cities' authority. The court noted the "extremely non-uniform way that education funding is distributed" negated the state's interest in uniformity, the extraterritorial impact on non-resident taxpayers of municipality was incidental, and the lack of justification to depart from the historic and constitutional authority of home rule municipalities to control sales and use taxes.

10. Zoning & Land Use

EPA jurisdiction restricted under the Clean Water Act
Sackett v. Environmental Protection Agency, 598 U.S. 651 (2023)

The U.S. Environmental Protection Agency (EPA) stopped a couple from backfilling their property with dirt and rocks as they prepared to build a home on a small lot and ordered that they remediate the site. The EPA viewed the site as protected wetlands and relied on authority granted to it under the Clean Water Act to regulate "the waters of the United States." The agency's regulations defined that term to include all waters that could affect interstate or foreign commerce and any adjacent wetlands (including those that were bordering, contiguous, or neighboring). EPA guidance asserted jurisdiction over any wetland with "significant nexus" to traditional navigable water, including when the wetlands in combination with other wetlands in the region had a significant effect on waters in an "open-ended hydrological and ecological sense."

The Supreme Court declined to defer to EPA's "significant nexus" interpretation and instead restricted the EPA's reach under the Clean Water Act to include only wetlands that are practically indistinguishable from waters of the United States.

Federally indebted water association can require developer to construct improvements
Deer Creek Water Corp. v. City of Oklahoma City, --- F.4th ---, 2023 WL 6056418 (10th Cir. Sept. 18, 2023)

Federal law (7 U.S.C. § 1926(b)) restricts public bodies, including municipalities, from curtailing or limiting the service provide by or through a federally indebted rural

water association by including the area served by the association in municipal boundaries. An Oklahoma water association sought a declaratory judgment to prevent Oklahoma City from provided water service to a proposed development on land was in its service area and received water primarily for agricultural purposes. The development required substantial off-site infrastructure upgrades and the association conditioned development approval on the developer paying for the infrastructure. The developers instead connected to closer city water infrastructure.

The Tenth Circuit Court of Appeals held that the water association did not lose the protection of the statute simply because the association's requirement that developer construct infrastructure to extend its service. The association established its capacity to provide service in a reasonable time, but the case was remanded to determine whether the cost of service was excessive.

Discriminatory group home regulations invalidated
Courage to Change Ranches Holding Co. v. El Paso County, 73 F.4th 1175 (10th Cir. 2023)

After being restricted from operating a rehab facility in a residential neighborhood, a treatment program switched to a group home structure. El Paso County's group home regulations allowed for various uses but set different occupancy limits for different arrangements (e.g., only five persons could live in a home for disabled persons but eight could live in a home for aged persons). The program challenged El Paso County's land use regulations under the Fair Housing Act and Americans with Disabilities Act, claiming that the county discriminated against persons with disabilities.

The Tenth Circuit Court of Appeals held that, compared to other regulated, structured group-living arrangements, the county's group home occupancy limits for disabled persons were facially discriminatory and lacked any governmental justification. The court also held that the county's restriction of the available services in group homes was discriminatory. The court rejected a failure to accommodate claim because the requested accommodation, operating a clinical facility in a residential area, was not available to similarly situated nondisabled persons.

Rule 106(b)'s strict limitations period confirmed
Brown v. Walker Commercial, Inc., 521 P.3 1014 (Colo. 2022)

A developer filed a Rule 106(a)(4) complaint thirty days after the City of Aurora's Director of Water issued his final decision regarding a storm drainage development fee. The developer argued, and the Colorado Court of Appeals agreed, that C.R.C.P. 6(b)'s permission of extensions of any time periods for excusable neglect authorized the trial court to disregard the strict twenty-eight day limitation of Rule 106(a)(4).

The Colorado Supreme Court unanimously reversed, holding that Rule 106(b) establishes a strict 28-day limitation period for invoking the district court's jurisdiction under Rule 106(a)(4), "consistent with nearly half a century of our case law," and is not subject to any equitable considerations, including a showing of excusable neglect under C.R.C.P. 6(b).

CML filed an amicus brief in the Court of Appeals and Supreme Court.

11. Eminent Domain

Condemnation transferred property in fee simple regardless of future use
Denver v. Monaghan Farms, --- P.3d ---, 2023 WL4241284 (Colo. App. June 2, 2023)

As part of building Denver International Airport, the City and County of Denver condemned 8,360 acres, obtaining immediate possession and proceeding through a valuation hearin. The parties settled during the appeal in 1992 and the district court vacated its prior orders and ordered that Denver had acquired all interests of the landowners and that title to the property vested in Denver.

In 2020, Denver filed a quiet title action because the landowner's asserted a reversionary interest because Denver now intended to use the property for private commercial purposes. The Colorado Court of Appeals rejected the claim that Denver did not acquire the parcels in fee simple absolute. Because conveyances are presumed to be fee simple, the lack of "magic words" in the condemnation petition, settlement agreement, or order did not limit Denver's title or create a reversionary interest. The change in use of the property did not affect Denver's title.

Lessees not entitled to attorney's fees in failed condemnation case
Mulberry Frontage Metropolitan District v. Sunstate Equipment Co., --- P.3d ---, 2023 WL 4502338 (Colo. App. July 13, 2023)

A metropolitan district filed a petition against a landowner and its lessee to condemn real property for street improvements. The lessee successfully moved to dismiss the action because the property was subject to a recorded covenant benefiting CDOT, presumably depriving the district of authority to condemn the property. The Colorado Court of Appeals rejected the lessee's argument that it was a "property owner" entitled to attorney's fees under C.R.S. § 38-1-122(1), which grants a property owner a right to fees when a court finds the petitioner was not authorized by law to acquire the property.

12. Miscellaneous

Race-based admissions standards violated equal protection standards
Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023)

Two universities' application processes included race as a component of the initial review. One considered race in scoring and then ranked all applications from a geographic region, later considering race as a component of the final winnowing of applicants. Another permitted reviewers to grant a bonus to applicants based on race and then permitted final decision-makers to consider race. Although *Grutter v. Bollinger* (2003) recognized obtaining a racially diverse student body was compelling state interest that justified the use of race in university admissions, the U.S. Supreme Court held that these universities' admissions systems failed to avoid the boundaries established in *Bollinger*. The Court held that the programs were not operated in a measurable manner that

permitted judicial review under strict scrutiny, lacked a meaningful connection to the goals pursued, operated as a negative factor for other applicants, and lacked a "logical end point."

Animal welfare law does not violate Dormant Commerce Clause
National Pork Producers Council v. Ross, 598 U.S. 356 (2023)

California enacted a law prohibiting the in-state sale of pork from pigs that had been confined in a cruel manner. Pork producer associations challenged the law as discriminating against interstate commerce in violation of the Dormant Commerce Clause, but conceded that the law did not directly discriminate against interstate commerce because all producers were treated equally. The U.S. Supreme Court declined to endorse the producer's recommended "almost *per se*" rule forbidding state laws that have a practical effect of controlling out-of-state commerce (or imposing substantial costs on out-of-state commerce). The proposed rule relied on cases that involved purposeful discrimination, not a mere incidental effect.

The Court also rejected a reading of *Pike v. Bruce Church, Inc.* (1970), which looks for discriminatory purpose through the burdens on interstate commerce, that would have invalidated a law if clearly excessive burdens outweighed putative local benefits. While the opinion disposed of the appeal, the justices disagreed, however, as to how to review the case under *Pike*.

***Rooker-Feldman* doctrine dooms Bruce's challenge to city liens**
Bruce v. City and County of Denver, 57 F.4th 738 (10th Cir. 2023), petition for cert. filed

Seeking remedy public nuisances, the City and County of Denver imposed fines and penalties as liens against the owner of derelict properties. During related administrative and judicial proceedings, Douglas Bruce, the former owner of the properties who had recorded a deed of trust, participated even though he was not named as a party. Bruce later filed a suit in federal court seeking to invalidate the city's liens as inferior to his own. The Tenth Circuit Court of Appeals affirmed the district court's dismissal of the suit under the *Rooker-Feldman* doctrine, which limits jurisdiction in federal courts over state court judgments. Bruce, although not an official party, had a right to participate in the state court proceedings and actively participated in them, precluding him from the later challenge.

Citizen cannot rely on state's ownership interest in property to establish standing in action regarding public property
State v. Hill, 530 P.3d 632 (Colo. 2023)

In a long-running dispute over river access, the Colorado Supreme Court granted certiorari to review whether a fisherman had standing to seek a declaratory judgment about the state's ownership of the riverbed. Not swayed by "hundreds of pages of briefing" on complex legal issues, the Court held that, because the fisherman's claims depended on a declaration of the state's property interests, the fisherman had no legally protected interest that was injured by restrictions on his access to the river. The

fisherman could not bring a quiet title action or a declaratory judgment claim regarding his right to fish where his interest as a member of the public arose from the state's, not his, ownership interest.

Knowledge of delivery problems at "last known address" undermined mail service
Home Improvement, Inc. v. Villar, 524 P.3d 329 (Colo. App. 2022)

A contractor obtained a default judgment on a mechanic's lien claim and the subject property was sold at a foreclosure sale. The former owner moved to set aside the judgment, arguing that service by mail at his last known address was improper. C.R.C.P. 4(g) permits service of process by mail in in rem proceedings at the address, or last known address, of the person to be served. The a contractor was initially aware of two addresses for the property owner – the property and a PO Box – but used as the "last known address" for service despite knowing that prior notices sent to that address had been returned as undeliverable. Finding that the district court had no in rem jurisdiction due to deficient service, the Colorado Court of Appeals held that the use of the property address was unreasonable once the contractor knew that mail could not be delivered there. At that point, the PO Box was the only "last known address" available.

Administrative adjudication required for review of general stormwater permit
Colorado Stormwater Council v. Water Quality Control Division, 529 P.3d 134 (Colo. App. 2023)

In 2008, through the Colorado Discharge Permit System, CDPHE issued a general permit for the operation of municipal separate storm sewer systems (MS4s) that included the operation of non-standard MS4s (*i.e.*, those operated by non-municipal public entities). After the permit was renewed with changes in 2021, the Colorado Stormwater Council challenged new restrictions in the permit. The Colorado Court of Appeals rejected the argument that a review hearing was discretionary. The court held that an adjudicatory hearing under the Administrative Procedure Act (APA) was a prerequisite to judicial review of agency actions on general permits governed by C.R.S. § 25-8-503.5. The court could not disregard specific references in that statute to an appeal process under the APA and deferred to the agency's regulatory interpretation of the process.

Unjust enrichment claims survive unenforceable contract provisions
Alderman v. Board of Governors of Colorado State University, --- P.3d ---, 2023 WL 4241290 (Colo. App. June 29, 2023)

After Colorado State University (CSU) closed its campus during COVID-19, a student filed breach of contract and unjust enrichment claims relating to her tuition and fees. The Colorado Court of Appeals held that the student failed to state a breach of contract claim because the statutory provision authorized the board of governors to temporarily suspend the university in case of fatal diseases. Even though the university was not suspended and closed completely, the court determined that the term included taking appropriate measures to respond to the emergency.

The court permitted the student to proceed with her unjust enrichment claim, even though CSU did not fail to provide services, to restore fairness when the contract (that CSU acknowledged) failed. The student lost contractual rights to enforce when CSU's contractual obligations were obviated by the statute. The court remanded the question of whether CSU's retention of tuition and fees was inequitable.

Statute of limitations under CDARA can be extended by contract

South Conejos School District RE-10 v. Wold Architects, Inc., --- P.3d ---, 2023 WL 6152563 (Colo. App. Sept. 21, 2023)

After a flood revealed defects in construction of a school, the school district sued the contractor, architects, and others. An architect asserted that the claims were time barred under the Construction Defect Action Reform Act, particularly C.R.S. § 13-80-104 (CDARA), under claims accrue when the physical manifestations of the defect were discovered or should have been discovered through reasonable diligence. However, the parties' contract defined the time of accrual of a claim as "when the injured party 'discovered,' by way of 'detection or knowledge,' a defect 'of a substantial or significant nature.'" The Colorado Court of Appeals held that the contractual provisions controlled, reasoning that if "statute of limitations can be waived or shortened . . . it is difficult to see why, absent a contrary legislative direction, it cannot be extended." The court found no express prohibition in CDARA or public policy reasons to restrict this contracting power.

Appendix 1: CML Amicus Participation
September 2022 to October 2023
https://www.cml.org/home/advocacy-legal/Amicus-curiae

***Aurora Urban Renewal Authority v. Kaiser,* 2022SC92**. The Arapahoe Urban Renewal Authority (AURA) brought an action to challenge the Arapahoe County Assessor's methodology for calculating incremental property tax revenue for urban renewal projects. The Court of Appeals held that AURA had standing to file this case and that the Assessor's Reference Library, which "proportionately" allocated the indirect changes in property value caused by the existence of an urban renewal plan, violated Colorado's Urban Renewal Law. The Colorado Supreme Court heard oral argument on September 19, 2023. CML also participated in the Court of Appeals case (*Aurora Urban Renewal Authority v. Kaiser,* 507 P.3d 1033 (Colo. App. 2022).

***County of Jefferson v. Stickle*, No. 22SC362.** In this appeal involving interpretation of two parts of the Colorado Governmental Immunity Act, the Colorado Supreme Court will consider: (1) whether a two-story parking lot located adjacent to the Jefferson County Courts and Administration Building is a building for purposes of the dangerous condition of a public building waiver in section 24-10-106(1)(c), C.R.S. (2022); and (2) whether the county's use of the same material for the parking lot's walking and driving/parking surfaces was a design issue for purposes of the dangerous condition analysis, entitling the county to immunity. The Colorado Supreme Court will hear oral argument on October 26, 2023. (CML joined in a brief filed by Colorado Counties, Inc.)

***City of Aspen v. Burlingame Ranch II Condominium Owners Association*, No. 22SC293.** The Colorado Supreme Court will consider whether the "economic loss" rule should be considered in determining whether residential construction defects claim "could lie in tort" under the CGIA. The Court of Appeals held in an unpublished decision issued March 17, 2022 (No. 20CA2088) that the trial court should have determined whether the rule would apply to mean that the claims could not proceed as tort claims such that the CGIA would provide immunity. The Colorado Supreme Court will hear oral argument on October 17, 2023.

***DePietro v. Coldiron,* 2022CA740 & 2022CA815, 523 P.3d 1019 (Colo. App. 2023).** The Colorado Court of Appeals reversed a district court's holding that Section 204(3)(a) of the Colorado Open Records Act requires that public record subject to the attorney-client privilege or the deliberative process privilege must be disclosed to a third party who is discussed in those records as a "person in interest."

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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

1437 Bannock St., Denver, CO 80202</td><td rowspan="3">DATE FILED: November 23, 2022 2:23 PM
CASE NUMBER: 2022CV31841

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<tr><td>Plaintiffs,
CITY AND COUNTY OF DENVER; CITY OF BOULDER; CITY OF COMMERCE CITY; CITY OF PUEBLO; and CITY OF WESTMINSTER,

v.</td></tr>
<tr><td rowspan="2">Defendants,
THE STATE OF COLORADO and JARED POLIS, in his official capacity as the Governor of the State of Colorado.</td></tr>
<tr><td>Case No.: 2022CV31841

Courtroom: 275</td></tr>
<tr><td colspan="2">ORDER: MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS</td></tr>
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THIS MATTER comes before the Court on Plaintiffs City and County of Denver, City of Boulder, City of Commerce City, City of Pueblo, and City of Westminster's (collectively, "the Cities") Motion for Partial Judgment on the Pleadings. The Court, having reviewed the Motion and other relevant materials, ORDERS as follows.

Background

The cities of Denver, Boulder, Commerce City, Pueblo, and Westminster are each home rule municipalities under Article XX of the Colorado Constitution. Section 6 of Article XX provides to these cities "all . . . powers necessary, requisite or proper for the government and administration of its local and municipal matters." These powers explicitly include "[t]he assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements." *Id.* § 6(g). Leveraging this power, each of the Cities imposes a local sales and use tax upon all construction and building materials, including those that might be used by contractors and subcontractors in building, renovating, and repairing public schools.

The State of Colorado is mandated to establish and maintain "a thorough and uniform system of free public schools throughout the state." *Id.* art. IX, § 2. Part of effectuating this mandate includes the construction of new public-school buildings and the maintenance, renovation, and repair of existing ones. To lower construction costs—and thereby preserve funds for usage elsewhere in the public education system—the state legislature statutorily exempted contractors working on public schools from paying state and local sales and use taxes. § 39-26-708(1)(c), (2)(c), C.R.S. This exemption did not, however, apply to taxes imposed by home rule

municipalities; the Cities have each continued to levy sales and use taxes on materials purchased by contractors working on public schools.

On April 18, 2022, Governor Jared Polis signed HB 22-1024, which amended section 39-26-708 by adding a new subsection (2.5) that specifically applies to home rule municipalities. In particular, subsection (2.5)(b) reads:

> Notwithstanding any other provision of law, in addition to the exemption from taxation created by subsections (1) and (2) of this section, there shall also be exempt from taxation **under part 1 of this article 26** any tax levied by a home rule city on all sales of construction and building materials to contractors and subcontractors for use in the building, erection, alteration, or repair of a public school.

Id. (emphasis added). Home rule cities do not levy taxes under Part 1, Article 26 of the Colorado Revised Statutes. During a hearing on August 9, 2022, this Court ruled that the revised statute was obviously intended to apply to home rule municipalities, despite the reference to the incorrect taxing authority.

HB 22-1024 came into effect on August 10, 2022.

Procedural History

The Cities filed a complaint on June 30, 2022, seeking to have HB 22-1024 declared an unconstitutional infringement on their home rule taxing authority. Defendants moved to dismiss on July 22, 2022, which the Court orally denied at the conclusion of the August 9 hearing. After Defendants filed their Answer and Counterclaim, Plaintiffs moved for partial judgment on the pleadings on August 24, 2022. Defendants filed an opposition to the motion on September 9, 2022, and Plaintiffs filed their reply thereafter on September 13, 2022.

Defendants have argued that the Cities' motion was premature because, as of August 24, there had yet to be a reply to their counterclaim. The Cities subsequently answered, which moots this hyper-technical procedural argument. The Court now proceeds to rule on the Cities' motion.

Legal Standard

Judgment on the pleadings pursuant to C.R.C.P. 12(c) is "appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law." *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001) (citing *Burns Int'l Sec. Servs., Inc. v. Int'l Union, UPGWA*, 47 F.3d 14, 16 (2d Cir. 1995)). In considering this motion, the Court must construe the allegations of the pleadings strictly against Plaintiffs and treat the allegations of Defendants' pleadings as true. *Smith v. TCI Commc'ns, Inc.*, 981 P.2d 690, 695 (Colo. App. 1999). Further, the Court will not grant such a motion "unless the matter can be finally determined on the pleadings." *Id.*

However, judgment on the pleadings may also be appropriate when "the issue is the proper interpretation or analysis of a constitutional provision or statute, which presents purely a

question of law." *Colorado Criminal Justice Reform Coal. v. Ortiz*, 121 P.3d 288, 295 (Colo. App. 2005). After careful consideration of the parties' briefs and the applicable case law, the Court concludes that it is presented with purely a question of law.

Discussion

I. *City of Boulder* is Not Dispositive

Defendants argue that this case falls squarely under the precedent of *City of Boulder v. Regents of University of Colorado*, 501 P.2d 123 (Colo. 1972). Resp. at 2–3. This Court disagrees. That case is not dispositive; in fact, it is only marginally relevant because the scenario in this case is fundamentally different than in *City of Boulder*.

The City of Boulder levied a tax on every person who paid to attend performances, athletic events, lectures or speeches, and displays or exhibitions, including all such events held under the auspices of the University. Besides ruling that Boulder could not force the Regents of the University—officials of the State—to collect the tax, the Colorado Supreme Court held that the tax was "invalid when applied to University lectures, dissertions (sic), art exhibitions, concerts, and dramatic performances," even when the tax was applied to those who were not enrolled as students at the University, because "the home rule authority of a city does not permit it to tax a person's acquisition of education furnished by the State." *Id.* at 126.

Defendants argue that the Cities' taxes on purchases of materials from private vendors by private independent contractors and subcontractors, who then use those materials for public schools, amount to taxes on the acquisition of education. Defendants repeatedly assert that the Cities are taxing school construction, thereby resulting in the State and school districts having less money to spend on public education. But the ordinance in *City of Boulder* was an attempt to directly tax a transaction between private individuals (those attending University functions) and the State (through the University). The tax at issue here is between two private parties, i.e., independent contractors and material suppliers. Schools may eventually, and indirectly, absorb all, part, or none of the tax through payments to these independent contractors, but that does not make it a tax on the acquisition of education or on the schools themselves.

In making this argument, Defendants also adopt an overly broad reading of *City of Boulder* and ignore part of the opinion. Unlike the category of events there that "become a part of the educational process," 501 P.2d at 126, the construction, alteration, and repair of school buildings and facilities may be disconnected from the acquisition of education. Indeed, the Colorado Supreme Court's affirmation of the validity of the *City of Boulder* tax as applied to CU football games suggests that just because something is connected to education does not as a matter of course make it part of the acquisition of education. *Id.* at 126–27. The reasoning in *City of Boulder* would mean that, even if the State could exempt taxation of materials used in building classrooms, a school district's construction of sport facilities could be the subject of the Cities' taxing authority.

In summary, the Court concludes there is a line beyond which the relationship between the burdened activity and education are too distant for *City of Boulder* to apply, and a different

analysis must be used. That line is crossed here, and the Court therefore proceeds with the analysis below.

II. Sales and Use Taxation Can be a Matter of Mixed Concern

In contrast to *City of Boulder*, the Cities argue that existing Colorado case law stands for the proposition that the "the State may not mandate exemptions from home rule municipalities' sales and use taxes" because the "right of home rule municipalities to levy sales and use taxes is exclusively a matter of local concern." Mot. at 4–5. Under this supposed bright line rule, the Cities claim that there is no need to use the framework for analyzing a conflict between state statutes and home rule ordinances established in *City and County of Denver v. State*, 788 P.2d 764 (Colo. 1990) [hereinafter *Denver v. State*].

However, the "authority granted to home rule municipalities in Section 6(a) is not unlimited" and even the "enumeration in Section 6 of matters subject to regulation by home rule municipalities is not dispositive." *Id.* at 770–71; *see also Fraternal Or. of Police, Colorado Lodge No. 27 v. City and County of Denver*, 926 P.2d 582, 588 (Colo. 1996) ("[T]he court of appeals conclusion . . . improperly fashions an absolute rule that when a state statute and home rule provision of the constitution are in conflict, the constitution always controls."). Indeed, *Winslow Construction Co. v. City and County of Denver*, 960 P.2d 685 (Colo. 1998), which the Cities contend supports their claim that sale and use taxation is always of local concern, goes through the *Denver v. State* conflict analysis framework in upholding the home rule municipality's tax.

Further, even matters of historically local concern can become, or evolve into, issues of mixed local and state interest. *See, e.g.*, *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013) (ordinance prohibiting cyclists from riding through town found to be a matter of mixed concern despite traffic regulation being of historically local concern); *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003) (ordinance prohibiting unrelated registered sex offenders from living together in single-family residence a matter of statewide concern as to child registered sex offenders, despite being analogous to a local zoning ordinance); *City of Commerce City v. State*, 40 P.3d 1273 (Colo. 2002) (regulation of automated vehicle identification systems a matter of statewide concern despite traffic regulation being of historically local concern); *Town of Vail v. Village Inn Plaza-Phase V Condo. Assn.*, 498 P.3d 1123 (Colo. App. 2021) (regulation of common interest communities considered a matter of mixed concern despite regulation of housing being historically local concern). Nor is the 'local concern' label permanent once affixed:

> The words "local and municipal" occurring in the [home rule amendment] is not a fixed expression that may be eternalized. What is local, as distinguished from general and statewide, depends somewhat upon time and circumstances. Technological and economic forces play their part in any such transition.

City of Commerce City, 40 P.3d at 1281 (alteration in original) (quoting *People v. Graham*, 110 P.2d 256, 257 (Colo. 1941)).

Therefore, the Court concludes that the Cities' asserted bright line rule is also inappropriate.

III. Defendants' Interests are not Sufficiently and Directly Implicated

The Cities' sales and use taxes and the State of Colorado's constitutional public education obligations cover two different subject matters. Nevertheless, "local laws may overlap with state [obligations], even though this is not clear from the language of either the local or state laws." *Ibarra*, 62 P.3d at 159.

In *Ibarra*, by way of example, a local zoning ordinance barring unrelated registered sex offenders from living in the same single-family residence was considered alongside the Colorado Children's Code. Even though there was no facially apparent overlap, the local ordinance as applied "regulate[d] a subset of registered sex offenders who [were] also covered by the procedures and protections granted to them by the Children's Code." *Id.* at 160. This overlap therefore meant the local ordinance necessarily implicated the State's obligations and interests as to these children.

The Court concludes there is no such overlap here. The Cities' taxes apply to private transactions between non-governmental actors, including independent contractors who purchase or use materials within city limits; the State's constitutional obligation, in contrast, is to provide a free, public education system available to residents of the state between the ages of six and twenty-one. Colo. Const. art. IX, § 2. It is undisputed that the Cities do not tax, and have in fact explicitly exempted from taxation, the State and its political subdivisions, including school districts. *See* Countercl. ¶ 9.

Rather than overlapping, the Cities' taxes are linked to the State's education obligations by the subset of independent contractors subject to the taxes who have contracted to work on public schools. But this indirect, third-party link does not and cannot serve to implicate the State's interests where no overlap otherwise exists—the State has not imputed its constitutional public education obligations upon independent contractors working for school districts by, for example, prohibiting such contractors from incorporating sales taxes into their project costs. To find otherwise would render the State's education interests without meaningful bounds. Under Defendants' reasoning, the State could prohibit home rule cities from collecting sales tax on all private purchases by school employees, thereby effectively increasing their salaries and saving state funds for other purposes.

As Defendants' interests are not sufficiently and directly implicated to justify the restrictions on the Cities, the Court could end its analysis here. However, it nonetheless will perform the *Denver v. State* factor analysis. The outcome does not change.

IV. *Denver v. State* Factors

When a state statute and a home rule ordinance conflict, well settled Colorado law has "developed three categories into which a specific issue may fall: (1) matters of local concern, (2)

matters of statewide concern, and (3) mixed matters of state and local concern." *Ryals v. City of Englewood*, 364 P.3d 900, 905 (Colo. 2016) (citing *Webb*, 295 P.3d at 486).

> Both the home-rule city and the state may legislate with regard to matters of local concern, but in the event of a conflict, the home-rule provision prevails over the state provision. In matters of statewide concern, the state legislature has plenary authority, and the home-rule city has no power to act unless the constitution or a state statute specifically affords it such power. For matters of mixed state and local concern, both the home-rule city and the state may regulate, so long as the regulations do not conflict. In the event of a conflict, the state law preempts and supersedes the local provision.

Id. (citations omitted). These three categories are not factually perfect, or mutually exclusive, descriptions—they often imperceptibly merge. *Denver v. State*, 788 P.2d at 767.

There is no definitive test that can determine whether an issue is of 'local,' 'mixed,' or 'statewide' concern; instead, a determination is made "on a case-by-case basis, considering the relative interests of the state and the municipality in regulating the matter." *Ryals*, 364 P.3d at 905. Nevertheless, *Denver v. State* established four factors that have been consistently useful in making this determination: (1) the need for statewide uniformity; (2) extraterritorial impact; (3) whether the matter is traditionally regulated at the state or local level; and (4) whether the Colorado Constitution commits the matter to state or local regulation. *Ryals*, 364 P.3d at 905; *Denver v. State*, 788 P.3d at 768. This list is not exhaustive, and the Court may consider other relevant factors as well. *Ibarra*, 62 P.3d at 156.

Finally, the General Assembly's declaration in section 39-26-708(2.5)(a)(IX) that the taxation of independent contractors working on public schools is a matter of statewide concern is relevant, but not binding. *See Winslow Const. Co.*, 960 P.2d at 694; *City of Commerce City*, P.3d at 1280.

A. Uniformity

Defendants have not alleged significant existing uniformity in the funding of construction, repair, and renovation of public schools. In fact, their counterclaim highlights the extremely non-uniform way that education funding is distributed: more funds are provided to poor districts than wealthy districts, Countercl. at ¶ 21; funding amounts are calculated in part based on "each district's unique cost of living, prevailing wages, and economies of scale," *id.* at ¶ 22; wealthy districts are funded primarily from local revenues while poor districts are funded mostly from state revenues, *id.* at ¶¶ 26–27; and school districts apply and compete for supplemental school construction funding from the Building Excellent Schools Today program. *Id.* at ¶¶ 38–39.

Defendants instead argue that the Cities' taxes result in increased costs that "make it even more difficult to achieve uniformity and consistency," Resp. at 6, and that HB22-1024 "restores some of that uniformity between taxed and untaxed school districts." *Id.* at 8. However, the complex funding and equalization scheme outlined by Defendants in their counterclaim makes it clear that absolute uniformity is not necessary for, and indeed may be incompatible with,

creating a public school system that is "of a quality marked by completeness, is comprehensive, and is consistent across the state." *Lobato v. State*, 304 P.3d 1132, 1139 (Colo. 2013). Without such a need, "uniformity in itself is no virtue." *Denver v. State*, 788 P.2d at 769 (citing *State ex rel. Heinig v. City of Milwaukie*, 373 P.2d 680, 684 (Or. 1962)).

B. Extraterritorial Impact

Extraterritorial impacts are "those involving the expectations of state residents, as well as those that create a ripple effect impacting state residents outside the municipality." *Webb*, 295 P.3d at 490 (citations omitted). Defendants argue an extraterritorial impact exists for two reasons: first, the Cities' taxes are a tax on education which betrays state residents' expectations that money earmarked for education will only be used for that purpose; and second, the Cities' taxes cause some state residents to pay increased property taxes and/or bond obligations, despite not living in the taxing city nor sending their children to a school within that city. Resp. at 8–10.

The Court has already rejected the notion that the Cities' taxes are a tax on education or the acquisition of education. *See supra* Part I. As such, these taxes do not impact the educational funding expectations of state residents.

The Court further concludes that the increase in property tax costs on some state residents outside of the home rule municipality is incidental: these same residents face variations in property taxes from how much of their school district's funding is locally raised and how much is provided by the State, which is dependent on a number of variable factors such as cost of living and prevailing wages in the district. *See* Countercl. at ¶¶ 21–39. "For an ordinance to create an extraterritorial impact, it 'must have serious consequences to residents outside the municipality, and be more than incidental or de minimus.'" *Ryals*, 364 P.3d at 907 (quoting *Ibarra*, 62 P.3d at 161). The effects of the Cities' taxes are too incidental to find an extraterritorial impact here.

C. Tradition and Constitution

While the construction of public schools in unquestionably within the purview of the state legislature, local sales and use taxes—including those as applied to private contractors—is a matter that has traditionally resided with home-rule municipalities. *Winslow Const. Co*, 960 P.2d at 694. Were this not the case, the amended statute now before the Court would not have been enacted. Additionally, the Colorado Constitution specifically commits this power to the home rule municipalities. Colo. Const. art. XX, § 6(g). Though "enumeration in Section 6 of matters subject to regulation by home rule municipalities is not dispositive, . . . it is significant. If the state is unable to demonstrate a sufficiently weighty state interest in superseding local regulation of such areas, . . . statutes in conflict with such local ordinances or charter provisions are superseded." *Denver v. State*, 788 P.2d at 771. Here, Defendants have not adequately demonstrated why a departure from tradition, and a restriction on the Cities' authority, is now needed to fulfill the State's constitutional mandate. As such, these two factors weigh heavily in favor of the Cities.

D. Other Factors

The Court makes note of an important additional factor: the impact to the State's education scheme is solely monetary. Prior case law has involved substantial practical disruption to the State's interests, programs, or other regulatory schemes. *See, e.g.*, *Webb*, 295 P.3d 480 (avoiding "patchwork bicycle regulations that may frustrate residents statewide as well as potentially affecting tourism"); *Ibarra*, 62 P.3d 151 (decreasing the number of foster homes available in the statewide system). However, rather than attempting to remedy a practical disruption to a statewide program, HB 22-1024 effectively shifts part of the State's public education monetary obligations to the Cities. This final factor is strongly in favor of the Cities.

V. This Matter is of Local Concern

The *Denver v. State* factors weigh decidedly in favor of the following finding: the sales and use taxation of materials purchases by private contractors, including those working on public schools, is a matter of local concern; the legislature's declaration that this is a matter of statewide concern is insufficient to tilt the balance otherwise. Even though Defendants have stated plausible interests in regulation of this matter, such interests are "insufficient to characterize the matter as being even of "mixed" state and local concern." *Denver v. State*, 788 P.2d at 767. Both the home rule municipalities and the State may legislate as to this local matter, but in the event of a conflict, as is the case here, the home rule municipalities' ordinances prevail. *Ryals*, 364 P.3d at 905.

Conclusion

The Court enters judgment on the pleadings in favor of the Cities and declares the portion of the statute at issue—subsection 2.5 of section 39-26-708—an unlawful infringement upon the Cities' home rule taxing authority granted in Article XX, Section 6 of the Colorado Constitution.

DATED AND ORDERED: November 23, 2022.

BY THE COURT:

Judge A. Bruce Jones
Denver District Court