COLORADO SUPREME COURT Colorado State Judicial Building 2 East 14th Avenue	
Colorado Court of Appeals, Case No: 2023CA1035 Judges Navarro, Kuhn, and Schock District Court, San Miguel County, Colorado Honorable Mary E. Deganhart Case No. 2020CV30023	
Petitioners: Tiffany Kavanaugh in her official capacity as Telluride Town Clerk; Lars D. Carlson; Annie K. Carlson; Mark A. Mitchell; Robert G. Efaw; Richard C. Stevens, Jr; Melody B. Stevens; Gregory Craig Simpson; Elizabeth B. Burk; Mark C. Quick; Lori S. Quick; Wells Management Trust Investments, LLC, a Texas limited liability company; Emil P. Sante; Pamela Sante; Butcher Creek Partners, LLC, a Texas limited liability company; Charles Parrish; Ashley Parrish; and 330 Telluride Condo, LLC, a Colorado limited liability company, **v.** **Respondents:** Telluride Locals Coalition Petitioners' Committee, Matthew Hintermeister; Ian Wilson; Daniel Aurand; and Brighton Properties, LLC, a Colorado limited liability company,	**▲COURT USE ONLY▲** Case Number: 2024SC522

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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER TIFFANY KAVANAUGH IN HER OFFICIAL CAPACITY AS TELLURIDE TOWN CLERK

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 4,062 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Robert Sheesley
Robert Sheesley, #47150

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The Colorado Municipal League ("CML") respectfully submits the following *amicus curiae* brief in support of Petitioner Tiffany Kavanaugh in her official capacity as Telluride Town Clerk.

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 271 of the 273 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 108 home rule municipalities, 162 of the 164 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000.

CML has regularly appeared in the courts as an *amicus curiae* to advocate on behalf of the interests of municipalities statewide, including in this Court in several cases relevant to the case at bar. Like the Town of Telluride ("Telluride"), Colorado's municipalities are vitally interested in any decision that could adversely affect how they regulate the use of land, provide for well-planned communities, and ensure the consistency and fairness of land use decisions. CML's participation will provide the Court with substantial justification for reconsidering certain overbroad and inflexible standards that have developed around the use of initiative and referendum powers under Article V, Section 1 of the Colorado Constitution.

Moreover, Colorado's municipalities, especially home rule municipalities, use broad power to regulate land use and plan for unique places through various techniques, including the Planned Unit Development Act of 1972, C.R.S. §§ 24-67-101 to -108 ("PUD Act") and local charters and ordinances, to plan for unique places in their communities. CML will provide the Court with an explanation of how the Court of Appeals' decision in this case and the improper extension of ballot-box zoning threatens the ability of municipalities to consistently regulate the use of land and the ability of landowners and other parties to rely on land use procedures and promises made by developers when master planning a community.

ARGUMENT

Although the issues certified for review only mention *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013), the heart of this case is the Court of Appeals' reliance on the principles announced in *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981). *Margolis* established a blanket rule that because zoning ordinances are legislative, then any zoning amendment is per se legislative for initiative and referendum purposes. This case offers the Court the opportunity to reconcile *Margolis*'s original reasoning and broad conclusions in light of subsequent case law, including *Vagneur*, that has confirmed the need to analyze proposed initiated ordinances on a case-by-case basis and to consider the nature of the action involved.

CML urges the Court to reconsider *Margolis*'s per se rule and hold that site-specific zoning actions, including the planned unit development (PUD) amendment at issue here and other matters involving a particular piece of land or set of property interests, are administrative and quasi-judicial for both initiative and judicial review purposes.

I. Sound reasons exist to reconsider *Margolis* as applied to site-specific actions.

This case involves, at its core, "fundamental principles of separation of powers." *See Vagneur*, 295 P.3d at 506. *Margolis* unnecessarily undermined the distinction between legitimate use of the people's reserved power to enact legislation and the power of government to operate without interference in administrative and quasi-judicial matters. The people's right to legislate is limited and does not extend to determining how policies are administered. *See City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (1987); *see also City of Aurora v. Zwerdlinger*, 571 P.2d 1074, 1076 (Colo. 1977) (announcing rule). Limiting *Margolis*'s unsound holdings as applied to site-specific land use actions, like the PUD amendment at issue here, is necessary in light of this Court's subsequent precedent. *See Bonde v. People*, 569 P.3d 109, 113 (Colo. 2025) (internal citations omitted) (reciting rule that the Court can depart from existing law if it is "clearly convinced that (1) the rule was originally erroneous or is no longer sound because of changing conditions and (2) more harm than good will come from departing from precedent"). Avoiding the

misclassification of proposed initiatives is especially critical for municipal governments in which a governing body's authority is not limited to legislative action (as with the General Assembly) and includes substantial ministerial, administrative, and judicial responsibilities.

A. *Margolis*'s per se rule is inconsistent with a case-by-case inquiry as to whether a proposed initiative is legislative or administrative.

By creating a per se rule, *Margolis* improperly extended the initiative power to acts that are not clearly legislative.[1] Some zoning-related actions, like an original PUD enabling ordinance or a jurisdiction-wide zoning map amendment, are obviously legislative in nature. At a certain point, however, land use decisions cease to be legislative and fall squarely into the administrative or quasi-judicial realm and outside of the initiative power, as with the PUD amendment at issue in this case. This Court's initiative and referendum decisions after *Margolis*, culminating in *Vagneur*, reveal the errors of *Margolis*'s broad holding, including its disregard of the size, scope, and complexity of a zoning action.

[1] This Court has suggested that a matter was within the initiative power only after finding that the matter was "clearly legislative." *See McKee v. City of Louisville*, 616 P.2d 969, 975 (Colo. 1980); *see also Margolis*, 638 P.2d at 303 (noting that it is "quite clear" that original zoning acts are legislative); 5 McQuillin Mun. Corp. § 16:53 (3d ed.) (initiative and referendum include only measures that "are quite clearly and fully legislative and not principally executive or administrative").

In *Margolis*, this Court considered the use of referendum to repeal three zoning changes in different municipalities: (1) the zoning of 31 parcels of newly-annexed land totaling 90 acres; (2) the rezoning of several properties covering a large area to create a "downtown" area conforming to the city's amended comprehensive plan; and (3) the rezoning of 3 acres to allow the construction of a single office building. 638 P.2d at 299-300. As is typical in such actions, citizens sought to use the power of referendum to repeal zoning changes approved by the city council after public hearings; with the annexation zoning, citizens also proposed alternative zoning by initiative. *Id*. This Court treated all three zoning actions as the same and announced a per se rule that all zoning ordinances and amendments are legislative in nature, even if the action would be characterized as quasi-judicial for purposes of judicial review. *Id*. at 303-05 (applying *Zwerdlinger* and overruling in part *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975)).

Margolis's per se rule was unnecessary at the time because the tests announced in *Zwerdlinger* adequately allowed courts to determine when the initiative or referendum power applied on a case-by-case basis. In *Zwerdlinger*, this Court recognized two primary tests to classify a proposed initiated ordinance: (1) actions that relate to subjects of a permanent or general character are legislative, but those that are temporary in operation and effect are not; and (2) acts that declare

public policy are legislative, but those that are necessary to carry out existing policies and purposes or that are executive are not. *Id*. at 1077.

Margolis acknowledged that municipal governing bodies perform both legislative as well as quasi-judicial functions but then concluded that "zoning and rezoning decisions – no matter what the size of the parcel of land involved – are legislative" because of the purposes of initiative and referendum and the nature of the acts of zoning and rezoning. 638 P.2d at 304. Relying on out of state precedent, *Margolis* asserted that original zoning was legislative because it was "of a general and permanent character and involves a general rule or policy" and it would be "inconsistent" to hold that rezoning was not legislative. *Id*.

This Court's view of initiative and referendum has evolved dramatically in subsequent decisions to respect limitations of those powers, including *Vagneur*. These cases reveal the errors of *Margolis*'s broad holding, including its disregard of the size, scope, and complexity of a zoning action and its insistence on a per se rule. This Court subsequently characterized the *Margolis* "legislative amendment test," which characterizes as legislative an amendment to a legislative act, as a third test that should be applied in "appropriate cases." *See Blackwell*, 731 P.2d at 1254 n.4; *see also Witcher v. City of Cañon City*, 716 P.2d 446, 449-451 (Colo. 1986). But this Court has not applied this principle as determinative or controlling in any case.

Vagneur exemplifies the best approach to determining whether an individual initiative is legislative or administrative. Although this Court relied on the "legislative amendment" concept in a non-zoning case to buttress its conclusion that an initiative was administrative, it did so only after applying the primary *Zwerdlinger* tests. *See* 295 P.3d at 509. This Court confirmed that "[w]hether a proposed initiative is legislative or administrative remains a case-by-case inquiry" and instructed that "the principles underlying those tests must guide the overall determination," without a single test controlling the outcome. 295 P.3d at 507. *Margolis* ignored this critical ad hoc determination that should be applied for each use of the initiative or referendum power.

Further, although categorization is convenient, the classification of a proposed initiative is not dictated by the subject matter of the action involved. In *Zwerdlinger*, this Court held that utility rate ordinances were not legislative, but only after examining the nature of the ordinances. *See* 571 P.2d at 1077. In *Witcher*, this Court applied the "legislative amendment" test to conclude that a lease amendment was administrative only after first conducting a detailed analysis under the *Zwerdlinger* tests to find that the original actions in question were administrative. *See* 713 P.2d at 451. In *Blackwell*, this Court viewed an initiative that would exclude the purchase of one parcel of land and one type of structure from the use of sales tax revenue as

administrative, although those actions were among the specific policy options created by the prior legislative adoption of a sales tax ordinance. *See* 731 P.2d at 1254-55.

Courts should not categorically treat all zoning amendments or actions as being equally legislative in nature. At most, the category into which an action falls (e.g., a utility rate ordinance, a lease amendment, a rezoning ordinance, an amendment to prior legislative action, etc.) could be a consideration when applying the *Zwerdlinger* tests on a case-by-case basis. Failing to at least clarify *Margolis* in this case would continue to cause harm by infringing on the administrative authority of municipalities, disrupting comprehensive planning, and increasing barriers to orderly development.

B. The quasi-judicial legal framework in which zoning or rezoning may occur must be considered in classifying a proposed land use initiative.

Margolis put Colorado in the minority of states that inconsistently view rezoning as legislative for purpose of the initiative power but quasi-judicial for purposes of determining the appropriate judicial review. *See* 638 P.2d at 304-05. This result is unsound because it relies on disregarding the legal framework in which zoning and land use planning occurs. "Whether a particular municipal activity is administrative or is legislation often depends not on the nature of the action but the

nature of the legal framework in which the action occurs." *See* 5 McQuillin Mun. Corp. § 16:53 (3d ed.). The considerations that municipalities and courts apply to determine when a matter is quasi-judicial significantly overlap with those used to determine whether a matter is legislative for initiative purposes. CML urges the Court to place these concepts on equal footing to avoid further confusion and the improper application of the initiative and referendum powers.

In the initiative and referendum context, legislation is understood as involving "broad, competing policy considerations, not the specific facts of individual cases." *Vagneur*, 295 P.3d at 507 (citing *Carter v. Lehi City*, 269 P.3d 141 (Utah 2012)). Conversely, this Court has described administrative actions as:

- requiring "specialized training and experience or intimate knowledge of fiscal or other affairs of government to make a rational choice"
- involving "specific data, facts and information necessary to arrive at a fair and accurate judgment upon the subject"
- requiring "careful study and specialized expertise, as well as discretionary judgment"
- "involving specific individual parties"

Id. (internal quotations and citations omitted).

Compare these concepts to the judicial review context in which this Court also looks to "the nature of the decision rendered by the government body" as the predominant consideration. *Snyder*, 542 P.2d at 374. A rezoning action is quasi-judicial if there are legal requirements of notice and hearing and the body is legally required "to make a determination by applying the facts of a specific case to certain criteria established by law." *Snyder*, 542 P.2d at 374. This Court has described quasi-judicial action as marked by:

- "a determination of the rights, duties, or obligations of specific individuals
- on the basis of the application presently existing legal standards or policy considerations
- to past or present facts developed at a hearing" conducted for that purpose.

Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622, 625 (1988) (internal citations omitted). These characteristics of quasi-judicial actions accurately describe a municipality's actions during the PUD development process.

Actions that are on a smaller scale or involving a specific site or landowner are particularly likely to be considered quasi-judicial. This Court has described legislative actions for judicial review purposes as "not normally restricted to

identifiable persons or groups" and "usually prospective in nature." *Id*. General policies that do not regard a specific property are generally legislative but the application of a general policy to a specific individual, interest, or situation is quasi-judicial for purposes of judicial review. *Snyder*, 542 P.2d at 376 (internal citations omitted). Using these standards, this Court has held that smaller scale rezonings and development approvals pursuant to statutory criteria were quasi-judicial. *See Cherry Hills Village*, 757 P.2d at 628; *Snyder*, 542 P.2d at 375. Conversely, a jurisdiction-wide rezoning affecting thousands of parcels is considered quasi-legislative "based on the prospective nature and broad impact" of the action. *See Jafay v. Bd. of Cnty. Comm'rs*, 848 P.2d 892, 898 (Colo. 1993); *see also Landmark Land. Co. v. City & Cnty. of Denver*, 728 P.2d 1281, 1285 (1986) (in dicta, noting that narrow legislative acts directly pointed at a specific person may be quasi-judicial for purposes of judicial review).

This Court already looks to the nature of the decision rendered by the governmental body in determining whether an action is legislative in both judicial review and initiative and referendum contexts. *Compare Cherry Hills Village*, 757 P.2d at 627, *and Snyder*, 542 P.2d at 373, *with Vagneur*, 295 P.3d at 507. Both require analysis of the substance and process of the specific action in each case. This Court also has borrowed from its initiative precedent to add to the judicial review

tests. *See Cherry Hills Village*, 757 P.2d at 625 (citing *Witcher* and *Margolis*). No justification exists to continue to separate these principles.

Recognition of the quasi-judicial nature of some zoning proceedings provides a much-needed limiting principle for *Margolis*'s broad holding. The power of initiative and referendum unquestionably has a place in the zoning context, although initiatives are rarely used to propose zoning map amendments; initial zonings or jurisdiction-wide rezonings may be properly considered legislative, as *Margolis* notes. 638 P.2d at 304. On the other hand, small scale rezoning involving one property, the issuance of a special permit, or an amendment of a PUD plan would properly be considered administrative and quasi-judicial. Implementing such a standard begins by abandoning *Margolis*'s categorical conclusions and recognizing the relevance of the attributes of quasi-judicial proceedings under the *Zwerdlinger* tests.

II. Ballot-box zoning creates havoc and undermines orderly growth and development.

This case reflects the inherent dangers of applying *Margolis*'s per se rule to interfere with administrative or quasi-judicial municipal actions. And, unlike the referenda in *Margolis*, the initiative here would circumvent legally required processes, the opportunity for informed public engagement, and an impartial hearing

in which relevant facts are applied to the legal criteria for the PUD amendment.[2] Instead, the parts of the electorate who choose to be engaged would be tasked with making the decision with limited and unverified information, based on their own principles, and without reference to the legal criteria for making the decision. The result is more likely than not to be uninformed, legally suspect decisions obtained by those who want an easier path to approving or stopping an action. If permitted to stand, the Court of Appeals' decision could enable further abuses of zoning processes, violations of development agreements and promises made in connection with initial zoning approvals, and unlawful zoning actions.

Margolis broadly dismissed concerns raised in that case (including by CML) that the ballot-box zoning would "lead to chaos, significant delays in development, and ultimately to unplanned growth and development." 638 P.2d at 305. Citing to similar powers being used in other states like California and Ohio, *Margolis* reasoned that the burdens of initiative and referendum would inhibit the use of those powers for minor actions and there was no evidence that allowing for zoning referenda would create "significant problems or delays in planning the growth and development." *Id.* However, the 1980 decision in California that confirmed the

[2] The Court may wish to consider that initiative and referendum should be evaluated differently in this context, given the substantial differences in the proceedings involved in each.

power to zone by initiative "opened the floodgates for ballot-box zoning in California," resulting in "600 land use-related ballot measures" in the subsequent 15 years. Bill Fulton, *Insight: 100 Years After Introduction of Voter Initiatives, 'Ballot-Box Zoning' Prevails*, [CALIFORNIA PLANNING & DEVELOPMENT REPORT] (Oct. 4, 2011), https://www.cp-dr.com/articles/node-3035 (last accessed Aug. 26, 2025). These popular efforts "often prevented the construction of new, often high-quality development for which there's market demand." *Id.* An analysis of ballot-box zoning in Ohio between 1980 and 1994 revealed that public referenda on rezoning increased uncertainty and risk for developers and resulted in lower levels of building activity. Samuel R. Staley, *Ballot-Box Zoning, Transaction Costs, and Urban Growth*, 67 [J. APA] 25, 34 (Winter 2001).

Rejecting concerns that ballot-box zoning violated due process rights of affected landowners, *Margolis* also concluded that an election supplanted a public hearing and that the people's vote, if arbitrary and capricious, would be subject to judicial scrutiny as if the governing body made the decision (i.e., possibly as a quasi-judicial decision). 638 P.2d at 305. These conclusions defy logic and create an inconsistent, unfair, and impractical system.

An election is no substitute for a quasi-judicial hearing, especially for an initiated ordinance that unlike a referendum has never been subject to zoning

procedures, public engagement, or a public hearing. Holding an elected governing body to different standards is both confusing and nonsensical if the decision to be made is the same. In a quasi-judicial rezoning, decision-makers apply facts developed at a noticed public hearing to criteria established by law. Decision-makers are restricted from relying on facts outside the record, making decisions based on prejudgment or bias, or voting on matters in which they have a conflict of interest. Decision-makers receive the benefit of expert advice and relevant information and reach a decision after deliberation. *See* Marcilynn A. Burke, *The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box*, 84 NOTRE DAME L. REV. 1453, 1527 (2009). An election is practically the opposite – voters can rely on prejudgment and bias, ex parte communication is encouraged, information is not required to be truthful, well-funded campaigns can better influence voters, and the legal criteria for the decision are irrelevant. *See id.* (concluding that ballot-box zoning often leads to deliberative failures based on issue complexity and manipulation).

The municipality's inability to meaningfully participate in an initiative election further separates a rezoning election from any semblance of rational decision-making. Colorado's Fair Campaign Practices Act prohibits a municipality from using public resources to support or oppose a ballot measure once it has been

submitted for purposes of having a title set or has had a title set. C.R.S. § 1-45-117(1)(a)(I). A municipality can only provide a neutral factual summary or the passage of a resolution of the municipality's position. C.R.S. § 1-45-117(1)(b). This minimal engagement handcuffs those best suited to provide accurate information and informed opinions from doing so.

Margolis's presumption that a court could review an election on a quasi-judicial rezoning decision is also untenable. An election provides no record against which to measure the electorate's decision (a circumstance highlighted in an initiative in which there is no hearing or record for an underlying decision). See Jonathan S. Paris, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819, 837-38 (1977). Colorado courts have yet to elucidate how to assess the validity of voters' decisions in such cases. Because a challenger is likely to succeed on the challenge to a quasi-judicial action by popular vote, substantial public resources are wasted in conducting an election, development projects are halted while the election and legal challenge occurs, and voters will be left confused as to why their action would not be substantiated.

There is little comfort in the view that a municipality or an interested party can obtain hypothetical judicial relief action after a costly election campaign. Development decisions are delayed for both the election and the litigation.

Adversely affected parties must then take legal action against the municipality to challenge the ordinance. This outcome is especially egregious for a landowner whose property was rezoned against their will by an outside interest. Notably, the eventual recourse to courts also does little to protect the right of initiative if the action taken by the election is ultimately overturned; voters will have had their say but done nothing more than make a statement and delay an inevitable legal decision.

For the municipality as a regulator, permitting landowners or others to circumvent zoning processes comes with significant risks. The municipality also could be exposed to liability for constitutional violations resulting from the decision. 4 Rathkopf's The Law of Zoning and Planning § 66:23 (4th ed.). Moreover, an initiative begun or threatened while an application is pending could be used to improperly influence the outcome of the application. Such unwarranted leverage has special significance here because the PUD Act includes provisions prevent arbitrary actions or misuse of the inherent discretion in this form of zoning. C.R.S. § 24-67-104(1) (requiring procedures for applications and hearings and specific findings of general conformity with a comprehensive plan); *see also* Donald L. Elliott, *Planned Unit Developments*, *in* COLORADO LAND PLANNING AND DEVELOPMENT LAW § 3.2.1, 105, 108 (Donald L. Elliott ed., 12th ed. 2021) ("The essence of a PUD is a

deal – an exchange of flexibility by the local government for extra quality, amenities, or something else the community would not otherwise get from the developer.").

Finally, ballot box zoning, at least for more localized decisions involving few properties, is inconsistent with sound planning. Burke, 84 NOTRE DAME L. REV. at 1527. Zoning decisions made by popular vote will have little, if any, relationship to a comprehensive plan. Instead, the operative factor will be the size of election campaign the applicant (or opponents) can afford. Without adherence to a comprehensive plan, zoning can degenerate into fragmented, disconnected decisions devoid of any discernible continuity. Comprehensive planning and zoning procedures designed to safeguard individual interests and provide for well-reasoned decisions, based on competent evidence, will not be relevant considerations. Such a result thwarts the goal of zoning in the first place, creates public cynicism for the zoning process, and contravenes the legislative intent evidenced by planning laws.

A site-specific zoning action that is quasi-judicial or administrative in nature, such as the PUD amendment at issue in this case, should not be subject to initiatives led by landowners or others seeking to end-run the legally-required rezoning and planning processes. Because the initiative power should not reach such matters, this Court can acknowledge the inadequacies and dangers of ballot-box zoning that *Margolis* disregarded.

CONCLUSION

CML respectfully requests that the Court reverse the decision of the Court of Appeals and hold that the PUD amendment in Telluride is not a proper subject for an initiative. In doing so, CML urges the Court to reconsider and update *Margolis*'s unnecessarily broad holding. CML requests that the Court articulate a logical standard for determining on a case-by-case basis whether zoning and rezoning actions are legislative for purposes of initiative. Such a standard should allow courts to consider the quasi-judicial nature of the proceedings.

Dated September 2, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this September 2, 2025, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER TIFFANY KAVANAUGH IN HER OFFICIAL CAPACITY AS TELLURIDE TOWN CLERK** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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