COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals Colorado Court of Appeals, 2015CA582 District Court, City and County of Denver, 2013CV854	
Petitioners: TABOR FOUNDATION, a Colorado non-profit corporation; and PENN PFIFFNER, v. **Respondents**: REGIONAL TRANSPORTATION DISTRICT; KATE WILLIAMS, BARBARA DEADWYLER, BONNIE ARCHULETA, JEFF WALKER, CLAUDIA FOLSKA, BOB BROOM, KEN MIHALIK, DOUG TISDALE, JUDY LUBOW, LARRY HOY, PAUL SOLANO, LORRAINE ANDERSON, NATALIE MENTEN, TINA FRANCONE, CHARLES SISK, Directors of the Regional Transportation District; SCIENTIFIC AND CULTURAL FACILITIES DISTRICT; ROB JOHNSON, ELAINE D. TORRES, HAL LOGAN, JR., LYNN JEFFERS, DAMON O. BARRY, KENDRA BLACK, DAN HOPKINS, KATHY IMEL, PEGGY LEHMANN, DEBORAH MALDEN, and ANN SPEER, Directors of the Scientific and Cultural Facilities District; COLORADO DEPARTMENT OF REVENUE; and BARBARA BROHL, Executive Director, Colorado Department of Revenue.	▲COURT USE ONLY▲
Attorneys for Amicus Curiae Colorado Municipal League: Martina Hinojosa, #46353 Dee P. Wisor, #7237 BUTLER SNOW LLP 1801 California Street, Suite 5100 Denver, CO 80202 Phone: 720-330-2300 Fax: 720-330-2301 E-mail: martina.hinojosa@butlersnow.com dee.wisor@butlersnow.com	Supreme Court Case No.: 2016SC639
BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENTS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of 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 3,957 words (does not exceed 4,750 words).

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

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/ Martina Hinojosa
Martina Hinojosa, #46353

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The Colorado Municipal League ("CML"), by undersigned counsel and pursuant to C.A.R. 29, submits this brief as *amicus curiae* in support of Respondents, Regional Transportation District ("RTD"); Kate Williams, Barbara Deadwyler, Bonnie Archuleta, Jeff Walker, Claudia Folska, Bob Broom, Ken Mihalik, Doug Tisdale, Judy Lubow, Larry Hoy, Paul Solano, Lorraine Anderson, Natalie Menten, Tina Francone, and Charles Sisk, as Directors of RTD; Scientific and Cultural Facilities District ("SCFD," and with RTD, the "Districts"); Rob Johnson, Elaine D. Torres, Hal Logan, Jr., Lynn Jeffers, Damon O. Barry, Kendra Black, Dan Hopkins, Kathy Imel, Peggy Lehmann, Deborah Malden, and Ann Speer, as Directors of SCFD; Colorado Department of Revenue (the "Department"); and Barbara Brohl, as Executive Director of the Department (collectively, the "Respondents").

INTEREST OF AMICUS CURIAE

Formed in 1923, CML is a non-profit, voluntary association of 269 of the 272 municipalities located throughout the State of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 168 of the 171 statutory municipalities, and the lone territorial charter town, all municipalities greater than 2,000 in population, and all but three of those having a population of 2,000 or less.

This case is of importance to municipalities and other local governments that impose sales taxes because requiring voter approval pursuant to Article X, Section 20 of the Colorado Constitution ("TABOR") for repeals of, or modifications to, exemptions from sales taxation[1] will hinder the efficient administration and collection of sales taxes, as well as the joint efforts of the business community and various local governments to simplify sales taxation. CML's participation as *amicus curiae* will provide the Court with a statewide municipal perspective on the impact that a ruling in favor of the TABOR Foundation may have on municipalities and other local governments.

ARGUMENT

The TABOR Foundation (the "Foundation") argues that the repeal or modification of certain sales tax exemptions pursuant to H.B. 13-1272 ("H.B. 1272" or the "Bill") either creates a new tax or constitutes a tax policy change resulting in a net revenue increase requiring voter approval pursuant to TABOR. Where, pursuant to voter approval, a municipality or other local government imposes a sales tax on the sale at retail of tangible personal property or services,

[1] Use taxes act as a counterpart to the sales tax and generally apply where a consumer brings an item of tangible personal property into a taxing jurisdiction for which no sales tax has been collected. C.R.S. § 39-26-202. Although this brief focuses on sales taxes, the same issues are presented for use taxes.

the subsequent repeal or modification of an exemption from the sales tax does not create a new tax or a tax policy change, even if it results in a net revenue gain. The policy of taxing the sale at retail of tangible personal property or services was established by the applicable voter approval. It is then up to elected officials to decide which transactions to tax, unless the applicable voter approval limits the types of transactions subject to sales taxation.[2]

CML urges the Court to consider the consequences for municipalities and other local governments if a TABOR election is required anytime a modification is made to the transactions which are subject to sales taxation. If a TABOR election is required in connection with the repeal or modification of an exemption from the sales tax, municipalities and other local governments may be limited in the types of action that they may take to improve the collection and administration of sales taxes or to simplify sales taxes for the benefit of retailers and consumers. Beyond that, the broad interpretation of TABOR that the Foundation urges could mean that any tax code change which repeals or modifies an exemption from the sales tax requires an election, creating an unchangeable statutory framework that allows little room for updates, housekeeping, or administrative adjustments.

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[2] For example, if the ballot issue expressly exempted the sale of food from taxation, that exemption will only be repealed by subsequent voter approval.

The Foundation also proposes that the Court abandon its long-standing "beyond a reasonable doubt" standard of review. For years, this Court has held that any enacted statute or municipal law is presumed to be constitutional unless proven otherwise beyond a reasonable doubt. CML believes that the Court should not overturn its prior holdings because abandoning the beyond a reasonable doubt standard of review may undermine the separation of powers doctrine.

A. Repealing or Modifying Exemptions from Sales Taxation is Not a Tax Increase or a Tax Policy Change.

1. Sales Taxation in Colorado

To understand the significance of this case to Colorado municipalities and other local governments, it is important to understand the complex and decentralized nature of sales taxation in Colorado. The State of Colorado (the "State") imposes a 2.9% sales tax (the "State Sales Tax") on the sale or purchase of tangible personal property at retail and upon the sale of certain services. C.R.S. § 39-26-104. The General Assembly has exempted a number of transactions from the State Sales Tax, as set forth in Article 26, Title 39, C.R.S.

The General Assembly has also authorized a number of local governments, including municipalities, counties, authorities, and various special districts, such as the Districts (collectively, the "Local Taxing Entities") to impose a sales tax. *See* "Taxable Transactions for Local Governments Authorized by Statute to Impose a

Sales Tax," attached hereto as Exhibit A. In addition, home rule municipalities impose a sales tax as a matter of local and municipal concern pursuant to TABOR and their home rule charters. *See Berman v. City and Cnty. of Denver*, 400 P.2d 434, 437 (1965). Prior to the passage of TABOR, many of the Local Taxing Entities were required by statute to submit a new sales tax or tax rate increase to the voters, while some home rule municipalities were required to do so by their home rule charter. Since the passage of TABOR, any new sales tax or tax rate increase imposed by either a Local Taxing Entity or by a home rule municipality must be submitted to the voters of the taxing entity. As of May 1, 2017, there were 297 government entities charging a sales tax in the State; this number includes 222 municipalities. *See* Colorado Department of Revenue, "Colorado Sales/Use Tax Rates," (May 1, 2017), attached hereto as Exhibit B.

Except for home rule municipalities, the State follows Dillon's Rule, which provides that statutory local governments have only such powers as are granted by the laws of the State, "…either in express words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation." *Hayward v. Bd. of Trs. of Town of Red Cliff*, 36 P. 795 (Colo. 1894). Each of the statutes that authorize the Local Taxing Entities to impose a sales tax are similar in form in that

the General Assembly grants the power to levy a sales tax (subject to voter approval). For example, C.R.S. § 32-9-119 provides: "the board, for and on behalf of the district, has the power to levy uniformly throughout the district a sales tax at any rate that may be approved by the board, upon every transaction or other incident with respect to which a sales tax is now levied by the state, pursuant to the provisions of article 26 of title 39, C.R.S." Similarly, C.R.S. § 29-2-102 states: "Any incorporated town or city in this state may adopt a municipal sales or use tax, or both, by ordinance in accordance with the provisions of this article, but only if the ordinance provides for the submission of the tax proposal to an election by the registered electors of the town or city for their approval or rejection…"

The statutes applicable to Local Taxing Entities provide that once the voters approve a sales tax, the tax is collected by the Department of Revenue. The Department of Revenue currently collects sales taxes for 225 Local Taxing Entities, including 152 municipalities. *See* Exhibit B. Local Taxing Entities' taxable transactions are generally the same as those subject to the State Sales Tax. Some Local Taxing Entities, such as statutory municipalities and counties, have the option to exempt specified transactions from their respective sales taxes. *See* C.R.S. § 29-2-105 (listing local option exemptions); *see also* Exhibit A.

Because transactions subject to sales taxation by Local Taxing Entities are, in most cases, the same as those subject to the State Sales Tax, each time the General Assembly changes the taxable transactions set forth in Article 26, Title 39, C.R.S., those transactions automatically are subject to taxation by Local Taxing Entities, without any action by Local Taxing Entities, unless the General Assembly provides that those changes do not apply to Local Taxing Entities. The only discretionary act by Local Taxing Entities, including the Districts, is deciding whether to seek voter authorization to impose the sales tax. After receiving voter authorization, most Local Taxing Entities[3] exercise no discretion as to which transactions are taxable or how sales taxes are collected.

In *Mesa County Board of County Commissioners v. State*, the Court held that where a government has received voter approval to waive the revenue limits of Section (7)(c) of TABOR, Section (4)(a) of TABOR does not require a second election for a tax policy change resulting in a net revenue gain. *See* 203 P.3d 519, 527 (Colo. 2009). As a result of the Court's decision, the Office of Legislative Legal Services issued a memorandum to the General Assembly setting forth tests

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[3] Statutory municipalities or counties that have elected to exempt certain transactions pursuant to C.R.S. § 29-2-105(1)(d) in submitting a sales tax question to voters could, at a later election, ask voters to repeal one or more of those exemptions.

for determining whether prior voter approval is required for a tax policy change resulting in a net revenue gain. *See* Office of Legislative Legal Services, Legal Memorandum dated November 12, 2009, attached hereto as Exhibit C. In its 2010 session, the General Assembly adopted, without prior voter approval, five bills which eliminated, suspended or modified the exemption for the sales of certain items as follows: H.B. 10-1189, related to direct mail advertising; H.B. 10-1190, related to fuels used for industrial purposes; H.B. 10-1191, related to candy and soft drinks; H.B. 10-1194, related to the sale of certain containers and bags to retailers or vendors of food; and H.B. 10-1195, related to certain items used in agricultural production.

2. Requiring a TABOR Election for Amendments to the Types of Items Subject to Sales Taxation Would Hinder Efforts to Simplify the Administration and Collection of Sales Taxes

The Court has "consistently rejected readings of TABOR that would hinder basic functions or cripple the government's ability to provide services." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008); *see also In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 557 (Colo. 1999) (rejecting an interpretation of Amendment 1 that would "cripple the everyday workings of government"). The Foundation proposes that a TABOR election is required each time a single item is added to the list of tangible personal property subject to a

sales tax, regardless of the intent behind such an addition. Such a requirement would make it more difficult for the General Assembly and home rule municipalities to simplify existing sales tax collection procedures.

For several years, the business community, CML, and certain governments have been working on the simplification and modernization of sales taxation, particularly as it relates to vendors without a physical presence in a jurisdiction and internet sales. *See* Streamlined Sales Tax Governing Board, Inc., "Streamlined Sales Tax," http://www.streamlinedsalestax.org/ (last visited June 9, 2017). The General Assembly has enacted legislation to tax transactions by remote vendors if Congress enacts an act that authorizes states to require certain retailers to pay, collect, or remit state or local sales taxes. *See* Colorado General Assembly, H.B. 13-1295 *Concerning the Implementation of the Minimum Simplification Requirements of the Proposed Federal "Marketplace Fairness Act"* 2012-2013 Reg. Sess. (May 28, 2013). Furthermore, the General Assembly has required the Department to make recommendations to the General Assembly regarding:

(I) A uniform definition of tangible personal property;

(II) A uniform list of items that are exempt from taxation by the state and local taxing jurisdictions;

(III) Uniform definitions of the tax-exempt items;

(IV) Rate changes, including consideration of rates of zero percent that would be necessary to achieve revenue neutrality for the state and any local taxing jurisdiction; and

(V) Any other recommendations deemed appropriate by the department of revenue regarding the establishment of a revenue neutral uniform sales tax base.

See C.R.S. § 39-26-128.

CML has worked with the business community and other stakeholders to develop standardized definitions for consideration and possible adoption by the 70 self-collecting home rule municipalities in the State. While many simplification efforts are intended to be revenue neutral, in aggregate they still could, in some circumstances, result in a particular transaction not previously taxed being subject to taxation.

Among the many practical reasons to pursue sales tax simplification is the collection process. For example, vendors operating in multiple jurisdictions are required to tax items not only in accordance with exemptions specific to each jurisdiction in which they may operate, but must also calculate taxes in accordance with the various tax rates imposed by specific entities. *See* Exhibit B. For example, a retailer operating within the Town of Foxfield, Colorado is required to

impose the State Sales Tax, the RTD sales tax, the SCFD sales tax, the Arapahoe County sales tax, and the Town sales tax. Thus, for every transaction, the retailer is required to first determine which items are subject to taxation pursuant to each taxing entity's exemptions. Then, the retailer must compute the State Sales Tax rate of 2.9%, the RTD sales tax rate of 1%, the SCFD sales tax rate of 0.1%, the Arapahoe County sales tax rate of 0.25%, and the Town sales tax rate of 3.75%. Prior to the enactment of H.B. 1272, the retailer would have been required to consider four different sets of exemptions (exemptions for the State, the Districts, the County, and the Town) and then apply five separate sales tax rates. Easing the burden on businesses was the General Assembly's intent in enacting H.B. 1272[4]. As a result of H.B. 1272, a retailer making a sale in those overlapping jurisdictions may apply a single set of exemptions from the sales tax of the State and the Districts, offering some relief in the complex tax computation process. While H.B. 1272 provided some tax simplification, there remain complexities in the State and local sales tax regime in Colorado.

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[4] "…the intended purpose of the tax expenditures in this act is to simplify the administration and collection of sales and use tax for the regional transportation district and the scientific and cultural facilities district." H.B. 13-1272, 69th Gen. Assemb. 1st Sess. (Colo 2013).

The State has demonstrated an interest in simplifying collection and remittance procedures for the sake of the Department, which oversees the collection, enforcement, and administration of sales taxes for the State, statutory counties, statutory cities and towns, numerous statutory entities (such as the Districts), and home rule entities that elect to have the Department administer sales tax collections on their behalf. *See* Section A.1., above, and Exhibit A. The entities for which the Department collects sales tax revenues represent at least 15 different types of entities, each controlled by a different statutory regime, some of which provide for unique exemptions. *See* Exhibit A. Each month, the Executive Director receives sales tax proceeds from vendors operating within each of these entities. In December of 2016, there were approximately 131,000 vendor accounts for remittance of sales tax revenues to the Department. In light of the complex collection and remittance procedures described above, there continues to be an interest in simplifying the collection and administration of sales taxes, as demonstrated by the Bill and by H.B. 17-1216, which creates a sales tax simplification tax force. *See Hearings on H.B. 13-1272 before the H. Fin. Comm.*, 69th Gen. Assemb., 1st Sess. (Mar. 27, 2013); *see also* Colorado General Assembly, H.B. 17-1216 *Concerning the Creation of the Sales and Use Tax Simplification Task Force*, 2016-2017 Reg. Sess. (June 5, 2017).

If the Court does not affirm the Court of Appeals decision based upon the rationale of the Court of Appeals, CML suggests that the Court adopt a standard for what constitutes a new tax. This standard should not cripple the everyday workings of government and should not require voter approval for actions by local governments or the General Assembly that are intended to streamline and promote efficiency in tax policy and collection. CML suggests that where a tax on a general class of transactions, such as the sale of tangible personal property at retail and upon the sale of certain services, has been approved by the voters a repeal or modification of an exemption for a transaction that fits within the general classification should not be treated as a new tax *unless* the tax rate is increased. For example, if a home rule municipality imposes a sales tax of 2% and the sale of soft drinks is exempt from such tax, the repeal of that exemption should not be treated as a tax increase. But if the municipality adopts a separate excise tax at a different rate on the sale of soft drinks, that should be a new tax subject to voter approval. *See* Alex Burness, *Boulder becomes nation's second city to vote in a soda tax*, DAILY CAMERA, Nov. 8, 2016, available at http://www.dailycamera.com/news/boulder/ci_30551847. Similarly, governments should be able to respond to changing technology or consumer behavior. For example, a government should be able to adopt a legislative act to clarify that the

sale of e-cigarettes is subject to its existing sales tax, but if it wishes to impose a new excise tax on e-cigarettes, that would be a new tax requiring voter approval.

Ruling in favor of the Foundation's proposal that a modification to the list of items subject to the Districts' sales tax constitutes a new tax or a tax policy change resulting in a net revenue gain would extend beyond the Districts. The efforts by CML, its member municipalities, and the business community to simplify sales taxation would be hindered because a mere adjustment to an overarching sales tax policy in the interest of administrative simplification would require a TABOR election.

B. The Beyond a Reasonable Doubt Standard Preserves the Separation of Powers Doctrine

It has been long-established in Colorado that every statute is presumed constitutional unless proven otherwise beyond a reasonable doubt. *See, e.g.*, *Alexander v. People*, 2 P. 894, 900 (Colo. 1884); *Rathke v. MacFarlane*, 648 P.2d 648, 655 (Colo. 1982); *In re Dwyer v. State*, 357 P.3d 185, 188 (Colo. 2015); *Tabor Found. v. Regional Transp. Dist.*, No. 15CA0582, 2016 WL 3600286, at *4 (Colo. App. June 30, 2016). The heavy burden imposed by the beyond a reasonable doubt standard is based on the deference the Court affords to the General Assembly in its law making duties. *See Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011). Such deference is consistent with the mandate of

Article III of the Colorado Constitution: " . . . and no person or collection of persons charged with the exercise of powers properly belonging to the [legislative, executive, and judicial branches] shall exercise any power properly belonging to either of the others, except as in [the Constitution] expressly directed or permitted." *See* Laura J. Gibson, *Beyond a Reasonable Doubt: Colorado's Standard for Reviewing a Statute's Constitutionality*, 23 COLO. LAW. 797, 835 (1994) (Citing COLO. CONST. art. III).

The Foundation is asking the Court to upend 150 years of precedent, which was put in place precisely to comport with the separation of powers doctrine, by abandoning the beyond a reasonable doubt standard in favor of a "plain showing" standard for all constitutional claims. *See* Petn. Opening Brief, p. 34 (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000)). Despite the gravity of the Foundation's request, it fails to articulate a framework for the Court to apply pursuant to its proposed "plain showing" framework. Instead, the Foundation merely cites to *Morrison*, wherein the United States Supreme Court held that the Commerce Clause does not empower Congress to enact legislation that provides a civil cause of action for victims of gender-motivated violence. Should the Court choose to adopt a "plain showing" standard of review, the Court would be forced to craft a tool of analysis from scratch that both honors the separation of powers

doctrine and provides a clear framework for Colorado courts in their consideration of constitutional claims.

In the alternative, the Foundation asks that the Court abandon the beyond a reasonable doubt standard when analyzing claims involving TABOR principles, thus overturning its recent holdings in *Barber* and *Mesa County Board of County Commissioners*. *See* 196 P.3d at 247-248; 203 P.3d at 527. In *Mesa County*, the Court clarified that while the beyond a reasonable doubt standard is a standard of review that applies to claims involving TABOR, the TABOR provision that calls for creating the greatest restraint on the growth of government constitutes a canon of construction to be applied when there are two equally plausible interpretations of TABOR's text.

To exempt TABOR from the beyond a reasonable doubt standard would invite claims calling for a modified standard of review for other constitutional provisions. It may also result in TABOR being prioritized over other constitutional principles, such as the separation of powers doctrine. For these reasons, CML encourages the Court to uphold the beyond a reasonable doubt standard.

CONCLUSION

For the foregoing reasons, CML asks that the Court hold that a repeal or modification of an exemption from sales taxation does not constitute a new tax or a

tax policy, regardless of whether it results in a net revenue gain. If the Court rules in favor of the Foundation, the Districts and other Local Taxing Entities would be required to hold TABOR elections each time the General Assembly seeks to simplify the collection and administration of sales taxes. Home rule municipalities would also be impacted because any adjustment to the specific items subject to sales taxation under their ordinances would require a TABOR election. Requiring TABOR elections under all circumstances involving an adjustment to taxable transactions would hinder municipalities in their ability to work with their constituents, including those in the business community, to simplify the collection and administration of sales taxes. Finally, CML asks that the Court uphold the "beyond a reasonable doubt" standard of review in order to preserve the separation of powers doctrine.

Respectfully submitted this 19th day of June, 2017.

/s/ Martina Hinojosa
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/s/ Dee P. Wisor
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CERTIFICATE OF SERVICE

I certify that on the 19th day of June, 2017, the foregoing document was filed with the court via ICCES. True and accurate copies of the same were served on the following via ICCES:

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