No. 21,401

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

NORMAN E. BERMAN, in behalf of himself and others similarly situated, Plaintiff-in-Error, v. CITY AND COUNTY OF DENVER, a municipal corporation, and CHARLES L. TEMPLE, Manager of Revenue of the City and County of Denver, Defendants-in-Error.	Error to the District Court of the City and County of Denver, State of Colorado HONORABLE DON D. BOWMAN, JUDGE

BRIEF OF AMICI CURIAE

J. KINNEY O'ROURKE
GORDON D. HINDS
JOSEPH W. ESCH
ALAN L. STERNBERG
A. M. EMIGH
WILLIAM O. DE SOUCHET, JR.
CHARLES ALEXANDER
L. M. COULTER
NEIL C. KING
GERALD J. ASHBY
JOHN E. KREIDLER
FREDERICK T. HENRY
1557 – 24th Street
Boulder, Colorado
Amici Curiae

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BRIEF OF AMICI CURIAE

INTRODUCTION

COME NOW the undersigned attorneys, amici curiae in the above named proceedings, and respectfully urge this Honorable Court to affirm the decision of the District Court in and for the City and County of Denver, Honorable Don D. Bowman, Judge, presiding, upholding the constitutionality, validity and enforceability of Ordinances

Numbered 166 and 166A of said City and County, said Ordinances providing for the levy and collection of retail sales and use taxes.

The undersigned attorneys, either in fact or through the Colorado Municipal League, represent twenty-nine (29) municipalities which have adopted local charters pursuant to Sec. 6, Art. XX, COLO. CONST., and one hundred ninety (190) second class cities and towns of the State of Colorado. Ten (10) of the home rule cities listed in Appendix A to this brief now levy and collect retail sales and use taxes according to ordinances similar to those in question herein, and the other, the City of Colorado Springs, has adopted an ordinance which levies retail sales and use taxes and provides for their collection commencing June 1, 1965. Appendix B herein lists the other eighteen (18) home rule cities and shows the potential impact of retail sales and use taxes, should they be adopted by those cities. Both appendices are set forth to provide this Court with additional information about the nature and financial impact of said retail sales and use taxes.

As stated in their *Motion to Appear Amici Curiae,* the undersigned have limited their argument herein to the following issue:

> ARE THE CITIES OF THE STATE OF COLORADO WHICH HAVE ADOPTED LOCAL CHARTERS PURSUANT TO SEC. 6, ART. XX, COLO. CONST., PROHIBITED FROM LEVYING AND COLLECTING RETAIL SALES AND USE TAXES?

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as set forth on pages 2 and 3 of the Brief of the Plaintiff-in-Error.

SUMMARY OF THE ARGUMENT

I. A MUNICIPALITY WHICH HAS ADOPTED A LOCAL CHARTER PURSUANT TO ART. XX, COLO. CONST., IS NOT PROHIBITED FROM LEVYING

AND COLLECTING A RETAIL SALES AND USE TAX BECAUSE SUCH TAXATION IS A LOCAL AND MUNICIPAL MATTER.

II. THE POWER OF A HOME RULE CITY TO LEVY AND COLLECT A RETAIL SALES AND USE TAX HAS NOT BEEN DIVESTED, LIMITED OR RESTRICTED BY ANY SUBSEQUENT AMENDMENT TO THE COLORADO CONSTITUTION.

ARGUMENT

I. A MUNICIPALITY WHICH HAS ADOPTED A LOCAL CHARTER PURSUANT TO ART. XX, COLO. CONST., IS NOT PROHIBITED FROM LEVYING AND COLLECTING A RETAIL SALES AND USE TAX BECAUSE SUCH TAXATION IS A LOCAL AND MUNICIPAL MATTER.

One of the most fundamental powers of the municipal corporation—taxation to raise revenue to finance its governmental activities—is called into issue in this case. The fact that the exercise of this power by a home rule city is questioned further complicates this Court's task of adjudicating the Plaintiff-in-Error's claims that the City and County of Denver lacks the power to levy and collect retail sales and use taxes.

By adopting and later amending Article XX, the home rule amendment, the people intended to give the citizens of municipal corporations full and complete control over their local affairs. This purpose has long been supported by this Court. Most recently, the Court examined an Act of the General Assembly which purported to allow the creation of a metropolitan capital improvements district with power to levy and collect retail sales and use taxes, the proceeds of the taxes to be used to finance local capital improvements within the district. In holding this statute *unconstitutional* as an unlawful invasion of the rights of home rule cities to control their local affairs, this Court said:

In numerous opinions handed down by the Court ex-

> tending over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal matters. *Four-County Metropolitan Improvements District, et. al., v. Board of County Commissioners of Adams County,* 149 Colo. 284, 294, 369 P.2d 67 (1962).

This being the long-standing position of this Court regarding the power of home rule cities to legislate, only one question need be answered:

> Is the levy and collection of retail sales and use taxes by home rule cities a local and municipal matter?

We believe the answer to this question must be YES, unless it is demonstrated that the people of the State of Colorado have, by adopting a subsequent constitutional amendment, clearly shown an intent to deprive their home rule cities of this local power. In this section we examine the local nature of the power to levy and collect retail sales and use taxes, reserving examination of the effect of any subsequent constitutional amendment to the next section.

The following quotation from Mr. Howard Klemme's very exhaustive article provides a good summary of the attitude this Court has taken toward home rule since the people adopted Article XX in 1902 (Mr. Klemme is a Professor of Law at the University of Colorado):

> Moreover, the history of the home rule amendment suggests that in terms of securing greater freedom in making policy judgments about municipal affairs, other powers were considered as, or more, important than the police power. Certainly today with municipalities providing an ever increasing number of services, other governmental powers, at least in total, should be of greater concern. The power to tax (including the power to levy local assessments and impose service charges), . . . , are all obviously vital to the capacity of a city to provide services to its inhabitants. It is clear from looking at these cases involving these powers that the court has given real meaning to the home rule amendment by

> allowing a wide range of freedom. . . . Klemme, "The Powers of Home Rule Cities in Colorado," 36 UNIV. OF COLO. L. REV. 321, 361 (1964).

Many disputes have arisen over the limits of a home rule city's powers, but this Court's rulings that home rule cities lack the power to legislate have been limited, on the whole, to only one area—exercise of the police power. e.g., *Gazotti v. City and County of Denver,* 143 Colo. 311, 352 P.2d 963 (1960); *Davis v. City and County of Denver,* 140 Colo. 30, 342 P.2d 674 (1959); *City and County of Denver v. Palmer,* 140 Colo. 27, 342 P.2d 687 (1959); *City of Canon City v. Merris,* 137 Colo. 169, 323 P.2d 614 (1958); *City and County of Denver v. Bridwell,* 122 Colo. 520, 224 P.2d 217 (1950); *People v. Graham,* 107 Colo. 202, 110 P.2d 256 (1941); and *Armstrong v. Johnson Storage & Moving Co.,* 84 Colo. 142, 268 Pac. 978 (1928).

Here the exercise of an entirely different power—the power to tax and raise revenue—is at issue. Generally, it has been said that:

> The power to tax is exercised to obtain revenue, while the police power, occassionally finding its expression in licensing and the charging of license fees, is to regulate or inspect, and the determination of which of these powers is utilized lies in the nature and intent of the legislative action taken rather than the designation given by the act. The power to regulate does not authorize the imposition of a tax on the privilege sought to be regulated. RHYNE, MUNICIPAL LAW, pp. 667, 668 (1957).

There can be no doubt that the ordinances in question involve an exercise of the power to tax, rather than the police power, since their sole purpose is to raise revenue to finance local governmental operations.

On the nature of a municipal corporation's power to tax, the United States Supreme Court has held, in a case involving a state legislature's failure to provide authority for a tax levy for bond retirement when issuance of the bonds was authorized:

> When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditures. . . . The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. . . . *A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.* (Emphasis added.) *United States v. New Orleans,* 98 U. S. 381, 393, 25 L.Ed. 225 (1879).

This Court's acceptance of Plaintiff-in-Error's interpretation of Article XX would be tantamount to ignoring the obvious wisdom of the Supreme Court's conclusion. Such an interpretation would give rise to a situation where the City and County of Denver and other Colorado home rule cities would have very broad authority under Article XX to perform an almost infinite number of local and municipal functions without the commensurately broad power under the same article to finance these functions locally. It seems unlikely that the people of this state, in adopting and amending Article XX, could have intended such a result. This is undoubtedly why this Court has so consistently upheld the power of home rule cities to levy a wide variety of local taxes. Klemme, *supra,* at p. 311, n. 179.

Furthermore, the Supreme Court of the State of California, when called upon to examine the powers of home rule cities under a constitutional provision similar to Art. XX, has carefully followed *U. S. v. New Orleans, supra.*

Perhaps the leading California case on municipal taxing powers is *Ainsworth v. Bryant,* 34 Cal.2d 465, 211 P.2d 564 (1949), where the Court quoted the New Orleans case with

approval. Plaintiff Ainsworth sought to enjoin tax collector Bryant from enforcing a City of San Francisco ordinance levying a tax of 1.5% of the purchase price on each transaction involving tangible personalty (package liquor in this case). The California Supreme Court rejected plaintiff's argument that the tax could not be applied in view of a constitutional provision which gave the state exclusive right to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor. The Court said that the power of a municipal corporation operating under a freeholders' charter to impose taxes for revenue purposes *is strictly a municipal affair,* pursuant to the direct constitutional grant of the people of the state, and that "the restrictions on the exercise of that power are only the limitations and restrictions appearing in the Constitution and the charter itself." Id. 211 P.2d at 566.

West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 95 P.2d 138 (1939), is informative because the plaintiff argued, similar to Plaintiff-in-Error herein, that the City must find specific authority for any exercise of its taxing power. Plaintiff questioned the City's authority to levy and collect license taxes for revenue purposes, and stated the general rule that municipal corporations possess only those powers expressly conferred or expressly incident to those expressly granted or essential to the declared objects and purposes of the corporation. The City argued that since no restriction upon the exercise of the taxing power appeared in the home rule amendment to the Constitution or its charter the power could be exercised, despite the fact that its charter contained no explicit grant of power.

The California Supreme Court held that there is no doubt that a local charter is an instrument which accepts the privilege granted by the home rule provision of the Constitution—*the privilege of complete autonomous rule with respect to municipal affairs.* Furthermore, the Court said the charter serves to specify the limitations and restrictions upon the power so granted and accepted. Id. 95 P.2d at 142. Finally,

the Court held that the levy of taxes by a municipality is strictly a municipal affair. Id. at 143.

Holding to the same effect are *City of Glendale v. Trondsen,* 48 Cal.2d 93, 308 P.2d 1 (1957) (general levy for garbage collection); and *Franklin v. Peterson,* 87 Cal. App. 2d 727, 197 P.2d 788 (1948) (municipal gross receipts tax).

These cases were decided under a provision of the California Constitution which, though similar to Colorado's Art. XX, Sec. 6, has traditionally been construed as more restrictive. This provision reads, in part, as follows:

> . . . Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, . . . , to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. . . . Art. XI, Sec. 6, CALIF. CONST.

In interpreting Article XX this Court has long accepted the rule that, in the absence of a limitation of the Constitution or charter, the legislative body of a home rule city may exercise any local power, including the taxing power, even though the exercise has not been specifically granted by the Constitution or charter. *McQuaid v. Pickins,* 91 Colo. 109, 112, 12 P.2d 349, 351 (1932).

The difference between the police power and the power to tax is well established in Colorado. *Post v. Grand Junction,* 118 Colo. 434, 195 P.2d 958 (1948), is the leading case. There the plaintiff sought a declaration that a municipal ordinance imposing a tax on dealers in intoxicating liquors is void, on the basis that the legislature had exclusive power to regulate the manufacture, sale, purchase and use of intoxicating liquors. Plaintiff claimed the exclusive power to regulate included exclusive power to tax. Because the General Assembly possessed the exclusive power to regulate, cities were divested of power to impose occupational excise taxes for local purposes.

This Court said that the authority of the state to regulate in this area was predicated upon an exercise of the police power, while the power of the city to levy a tax in this area was based upon its taxing power to provide revenue for the maintenance of local government. Id. 118 Colo. at 436. This principle was followed by this Court in *Jackson v. Glenwood Springs,* 122 Colo. 323, 221 P.2d 1083 (1950), relating to a municipal occupation tax on all businesses, professions and occupations; *Hollenbeck v. City and County of Denver,* 97 Colo. 370, 49 P.2d 435 (1935); and *Interstate Business Exch. v. City and County of Denver,* 68 Colo. 318, 190 Pac. 508 (1920). The latter two cases both involved specific occupation taxes.

Again, these cases, particaularly the *Post* case, *supra,* stand for the proposition that municipalities inherently possess the taxing power as a device to provide revenue for the maintenance of local government. These cases also demonstrate that this Court has adopted and followed the conclusion of *U. S. v. New Orleans, supra,* that taxation is a local and municipal matter. Furthermore, this power is, as demonstrated by these cases, not limited to ad valorem taxes.

That taxation is a local matter is further demonstrated by Art. X, Sec. 7, COLO. CONST., which provides:

> The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by law, vest in the corporate authorities thereof respectively, the power to assess and collect taxes for all purposes of such corporation.

This provision could have been included in Article X for only one reason—the people wanted to prohibit the General Assembly from meddling in a strictly local affair, that of taxation for local purposes. It has been said of a similar provision in the California Constitution, Art. XI, Sec. 12, that it was designed to forbid the state legislature from ordering or controlling expenditures for municipal purposes. David, "Home Rule in California," 5 AMER. MUNI. L. REV. 125 (1939-1940).

Plaintiff-in-Error argues that *City and County of Denver v. Sweet,* 138 Colo. 41, 329, P.2d 441 (1958), is authority for the proposition that a home rule city does not have every power that could be given by the legislature. We agree with this general statement, insofar as it refers to powers that are state-wide in character or that have been restricted by other provisions of the Constitution. But as to local and municipal matters, a home rule city's power is supreme, unless it has been restricted by other provisions of the Constitution. Id. 138 Colo. at 49. The decision in *Sweet* only stands for the proposition that a power conferred upon home rule cities by Article XX over local and municipal matters may subsequently be divested by a later constitutional amendment.

How does the local retail sales and use tax fit this pattern of permissible taxation as delineated by the decisions cited herein? MOAK AND COWAN, ADMINISTRATION OF LOCAL SALES AND USE TAXES (Municipal Finance Officers Association of the U. S. and Canada, 1961), is an authoritative discussion of this area of local taxation. Defining the sales tax as a tax based upon the value of tangible personalty and services at the time of sale, the authors point out that it was first levied by the Greeks and Egyptians. Id. at 1 and 4. The Romans popularized the tax and brought it to France and Spain, and England adopted its first comprehensive sales tax in 1940 as a purchase tax on wholesale transactions. Id. at 4. However, specific excises similar to sales taxes were levied in England in the early part of the 17th Century. 1 COOLEY, BLACKSTONE'S COMMENTARIES 198, 199 (3rd ed. Rev., 1884).

The use of the sales tax as a measure to finance the operations of municipalities was begun in 1934 when the City of New York adopted a two per cent tax. The complementing use tax, a charge imposed upon the use, consumption or storage of personalty for the protection of the sales tax jurisdiction from tax avoidance, was first levied by New York City in 1940. MOAK AND COWAN, *supra,* at 3 and 6. San Bernadino was the first California city to adopt the sales tax in 1943. Id. at 6. By January 1, 1960, approximately 1973 units of local government in the U. S. had adopted the

sales tax as a measure for producing revenue locally. Of this total, 1709 were municipalities. As of 1960, local sales taxes were levied in the following states: Alabama, Alaska, Arizona, California, Colorado, District of Columbia, Illinois, Louisiana, Mississippi, New Jersey, New Mexico, New York, Utah and Virginia. Local administration of these taxes is prevalent in all of these states, except for California and Illinois. Id. at 11. As a general rule, the percentage of total local governmental revenue produced by sales taxes has increased from 8.1 per cent in 1954 to 10.1 per cent in 1958; and sales taxes as a revenue source for local government have increased on a nationwide basis by over 61 per cent from 1954 to 1958. U. S. Bureau of the Census, *Compendium of City Government Finances in 1958*, p. 6.

The reasons for the growth of the sales tax as a local revenue source are apparent. First, the property tax, typically regarded as local government's revenue source, has become overburdened, particularly in areas of dense population. The rising costs of providing local governmental services have contributed to this burden.

Second, governmental entities which provide only state services or functions on a local level, such as school districts, must rely upon the General Assembly for taxing authority. In Colorado, school districts have only one source of revenue on a local basis—the property tax; and, in the absence of increased state aid, the school districts have turned to increases in their property tax levies for the revenue needed for education. A comparison of school district, county and municipal revenues from the property tax, as reported in the annual reports of the Colorado Tax Commission, clearly demonstrates the increasing reliance of school districts upon the property tax as a device to meet the demands for educational services. On the other hand, the reliance of municipalities upon the property tax as a local revenue raising device has decreased. GOVERNOR'S LOCAL AFFAIRS STUDY COMMISSION, STATISTICAL DATA, Tables R-7a, R-7b, R-7c and R-8 (1964).

The latter table is devoted exclusively to the City and County of Denver, and shows that 46.1 per cent of Denver's revenue in 1958 was derived from the property tax, while

9.9 per cent of its revenue came from the sales tax. In 1962 the property tax figure for Denver decreased to 36.5 per cent and the sales tax figure increased to 15.6 per cent.

All of this indicates that the municipality, because of its broader local taxing powers, is in a better position to distribute the impact of its tax burden and, particularly, to alleviate the overburdened property tax—an undertaking which is not possible for counties and school districts because of their limited taxing powers.

We submit to this Honorable Court that Art. XX, Sec. 6, COLO. CONST., gives home rule cities all embracing power as to local and municipal matters, and that one such local and municipal matter is the power of taxation for the purpose of raising revenue to finance local governmental activities. Further, we submit that this power of taxation includes the power to levy and collect retail sales and use taxes.

II. THE POWER OF A HOME RULE CITY TO LEVY AND COLLECT A RETAIL SALES AND USE TAX HAS NOT BEEN DIVESTED, LIMITED OR RESTRICTED BY ANY SUBSEQUENT AMENDMENT TO THE COLORADO CONSTITUTION.

Only one amendment to the Colorado Constitution, adopted after Art. XX, could operate to divest, limit or restrict the power of a home rule city to levy and collect retail sales and use taxes—Art. XXIV, the Old Age Pension Amendment. This article raises two questions regarding the local finance powers of a home rule city:

1. Does Art. XXIV divest home rule cities of their local power to levy and collect retail sales and use taxes for the purpose of raising revenue for local functions?

2. Does the language of Sec. 2, Art. XXIV, requiring eighty-five (85) per cent of all revenue from excise taxes to be credited to the Old Age Pension Fund, limit or restrict home rule cities' local power to levy and collect retail sales and use taxes?

The answer to both questions is NO, according to long-standing decisions of this Court and careful analysis of the language of Art. XXIV.

In *State v. City and County of Denver,* 106 Colo. 519, 107 P.2d 317 (1940), this Court considered the impact of Art. XXIV upon a so-called cigarette tax levied by Denver. *It was held that Art. XXIV did not apply to municipal taxes,* the Court saying:

> Reading the quoted consititutional provision as written, we fail to find any language which expressly or by reasonable inference refers to taxes or license fees that have been imposed by a municipality, or otherwise than by the usual legislative process of the state as a whole. . . . Obviously the moneys do not come within the purview of the amendment. Id. 106 Colo. at 521.

This Court has also stated that the Old Age Pension Amendment is of state origin, and that the taxing authorities of counties, municipalities and school districts would be acting without authority if they attempted to make levies on behalf of the Old Age Pension Fund. *Bedford v. Sinclair,* 112 Colo. 176, 180, 147 P.2d 486 (1944).

Despite the fact that it was decided prior to 1956 when the Old Age Pension Amendment was changed, *Bedford* still stands for the proposition that Art. XXIV does not levy a tax, Id. 112 Colo. at 179, and a close reading of Art. XXIV indicates that it does not even purport to give the General Assembly authority to levy and collect sales and excise taxes. Despite Sec. 5, Art. XXIV, which was added in 1956, the amendment merely assumes such authority is vested in the General Assembly. However, such an assumption does not mean that such authority is vested exclusively in the state legislature, since home rule cities possess the authority to tax for local purposes while the legislature possesses the authority to tax for state purposes.

In fact, extension of the doctrine of pre-emption of revenue sources, if carried to its logical end, would mean that any entry by the state would automatically bar entry by a municipality. As a practical matter, this has not been the case, and such a result has been discarded in the police

power area by this Court's decision in *Woolverton v. City and County of Denver*, 146 Colo. 247, 361 P.2d 982 (1961).

City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958), cannot be regarded as authority for Plaintiff-in-Error's assertion that Art. XXIV constitutes a pre-emption of this revenue source by the state, since the constitutional amendment construed in *Sweet* contains language quite dissimilar from that of Art. XXIV. In *Sweet* this Court held that the language of Art. X, Sec. 17—"The general assembly may levy income taxes, . . . for the support of the state, or any political subdivision thereof, or for public schools. . . ."—gave the legislature *exclusive* power to levy the income taxes. Id. 138 Colo. at 51.

Without answering the question of whether a home rule city had the power to levy an income tax prior to the adoption of Art. X, Sec. 17, this Court did say that the city's right to levy such a tax must be examined in light of whether its power under Art. XX had been limited or altered by either constitutional amendment or a broadening of what is of state-wide concern. Id. at 50. In *Sweet* this Court found a limitation by subsequent constitutional amendment. The *Sweet* case is clearly distinguishable, especially in light of this Court's discussion of Art. XXIV in *Bedford, supra.* Art. X, Sec. 17, gives a branch of the state government specific authority to levy a tax for all governmental purposes, both state and local, while Art. XXIV does not give such authority.

Furthermore, the doctrine of pre-emption of governmental revenue sources should be limited to those situations where the people or the legislature have specifically expressed a desire for its application. The people of the state gave such an expression when they approved Art. X, Sec. 17, authorizing a state income tax. However, no similar expression can be found in Art. XXIV, relating to Old Age Pensions, and the General Assembly has not imposed any limitation or restriction by the provisions of the state sales tax statute, COLO. REV. STAT. ANN., 1963, § 138-5-1, *et. seq.*

By the same token, a divestment of the taxing powers of municipalities is expressly stated in COLO. REV. STAT. ANN.

1963, § 138-2-14, relating to the motor fuel tax. On the other hand, when it recently adopted the state cigarette tax, the General Assembly specifically provided that the state legislation would have no impact upon local cigarette taxes. Chap. 98, § 13, *1964 Session Laws of Colo.*

The most recent case on the impact of Art. XXIV is *Post v. Grand Junction,* 118 Colo. 434, 195 P.2d 958 (1948), which held, at p. 440, that the tax in question did not come within the operation of the Article because it was not a tax on liquor but an occupational excise tax upon the business of selling liquor.

The Old Age Pension Amendment was adopted by the voters in 1936 and later amended in 1956 for procedural reasons. The City and County of Denver adopted the retail sales and use tax in 1947, and the City of Pueblo adopted the tax January 1, 1956, prior to the vote on the Old Age Pension Amendment. The citizens of Denver and Pueblo overwhelmingly supported the changes in Art. XXIV which were on the ballot in 1956. *State of Colorado, Abstract of Votes Cast at the General Election of November 6, 1956, for Proposed Constitutional Amendments,* (1956). We doubt that the citizens of these cities would have expressed such overwhelming approval of a revised Art. XXIV had they thought that they might be divesting themselves of ability to use the retail sales and use taxes as a local revenue raising measure.

A review of newspaper articles in the *Denver Post* and the *Rocky Mountain News* for one week before and after the November, 1956, election only supports this contention, since the possible impact of Art. XXIV upon local sales and use taxes was not mentioned. Similarly, the Colorado Legislative Council's *Analysis of 1956 Ballot Proposals* fails to mention any possibility of Art. XXIV divesting, limiting or restricting the power of home rule cities to levy such excise taxes. Finally, McNichols, *Financing Government in Colorado,* at 422 (1959), contains the observation that, "Home rule cities in Colorado have undoubtedly the power to adopt a sales tax. . . ."

In construing the impact of Art. XXIV, this Court should also note that since Denver first adopted the retail sales and use tax as a local revenue measure in 1947 only two cases

have been brought challenging the validity of the tax. The first, *Hedgecock v. City and County of Denver,* Dist. Ct. in and for the City and County of Denver, Civil Action No. A-57242, was relied upon by Judge Bowman in the trial court below. This case is the second and was brought sixteen years after the *Hedgecock* case was decided. During the interim, eleven home rule cities in addition to Denver, have relied upon the validity of the local retail sales and use tax, and their use of this revenue source has not been challenged.

In *Bedford v. Sinclair, supra,* 112 Colo. at 182, this Court said that the rule of contemporaneous construction justified the decision. This Court also said that the application of Art. XXIV in question therein had not been suggested for a period of five years after the amendment was adopted, despite the fact that several proceedings regarding the amendment had been brought during that time. Finally, this Court said that "the evident contemporary interpretation of those actively promoting the amendment, should be accorded considerable weight."

It must be concluded, therefore, that the framers of the 1956 amendments to Article XXIV, with the decisions of *State v. Denver, Bedford v. Sinclair,* and *Post v. Grand Junction, supra,* in mind, did not intend to divest, limit or restrict home rule cities of their authority. If they had, express language to that effect would have been included in the amendment adopted by the people that year.

Our argument is further borne out by an examination of other constitutional amendments which have been construed by this Court to constitute a divestment of power over local matters under Article XX. Art. XXII, giving power to regulate the manufacture, sale and distribution of intoxicating liquors to the General Assembly, made this matter of statewide concern. Any act of a home rule city in this area of regulation must be justified by an express grant of power from the General Assembly, just as though the home rule city were a statutory city. *Geer v. Rabinoff,* 138 Colo. 8, 12, 328 P.2d 375 (1958).

Art. XXV, adopted in 1954, was added for the purpose of divesting home rule cities of certain regulatory powers over

private public utilities and placing this jurisdiction with the Colorado Public Utilities Commission. Klemme, *supra,* 36 UNIV. OF COLO. L. REV. at 357. The language divesting the cities of their power was very specific.

This Court has not engaged in the practice of interpreting one constitutional provision in a manner which would restrict or limit the operation of another provision, unless the language is express and explicit in its restriction or limitation. We submit that this Court should follow this sound policy on this occasion and recognize that Art. XXIV, the Old Age Pension Amendment, does not unequivocally or expressly divest, limit or restrict the power of home rule cities to levy and collect retail sales and use taxes.

CONCLUSION

In light of the authorities cited herein, *Amici Curiae* submit that the home rule cities of the State of Colorado are not prohibited from levying and collecting retail sales and use taxes because such taxation is a local and municipal matter. Further, we submit that this power of a home rule city over a local and municipal matter has not been divested, limited or restricted by any subsequent amendment to the Colorado Constitution.

Respectfully submitted,

J. KINNEY O'ROURKE
Attorney for the Colorado
Municipal League
1557 — 24th Street
Boulder, Colorado
443-0707

GORDON D. HINDS
Attorney for the City of Pueblo
City Hall
Pueblo, Colorado

JOSEPH W. ESCH
Attorney for the City of Englewood
303 First National Bank Building
Englewood, Colorado

ALAN L. STERNBERG
Attorney for the City of Littleton
709 West Littleton Boulevard
Littleton, Colorado

A. M. EMIGH
Attorney for the City of Durango
Drawer 219
Durango, Colorado

WILLIAM O. DESOUCHET, JR.
Attorney for the City of Alamosa
P.O. Box 779
Alamosa, Colorado

CHARLES ALEXANDER
Attorney for the City of Gunnison
First National Bank Building
Gunnison, Colorado

L. M. COULTER
Attorney for the City of Aurora
City Hall
Aurora, Colorado

NEIL C. KING
Attorney for the City of Boulder
Municipal Building
Boulder, Colorado

GERALD J. ASHBY
Attorney for the City of Grand Junction
P.O. Box 510
Grand Junction, Colorado

JOHN E. KREIDLER
Attorney for the City of Montrose
36 South Uncompahgre
Montrose, Colorado

FREDERICK T. HENRY
Attorney for the City of Colorado Springs
501 Mining Exchange Building
Colorado Springs, Colorado

APPENDIX A - PART 1

Financial Data Relating to Sales and Use Taxes Levied by Colorado's Home Rule Cities

City (1)	County (2)	Population (3)[a]	Effective Date of Sales Tax Ordinance (4)	Period in Effect (5)	Amount of Tax (6)	Total Sales & Use Tax Collections (7)	Total Sales Tax Collections (8)	Total Use Tax Collections (9)	Yearly Sales and Use Tax Collections (10)
Pueblo	Pueblo	96,000	1-1-56	8 yrs. 8 mos.	1%	$6,292,956[c]	$5,645,536[c]	$647,420[c]	$ 835,000[b]
Englewood	Arapahoe	36,700	1-1-62	2 yrs. 8 mos.	1%	782,378[d]	627,761[d]	154,617[d]	336,850[b]
Littleton	Arapahoe	17,700	1-1-62	2 yrs. 8 mos.	1%	460,734[e]	391,624[e]	69,110[e]	189,347
Durango	La Plata	11,000	4-1-62	2 yrs. 5 mos.	1%	422,589[f]	384,556[b]	38,033[b]	185,000[b]
Alamosa	Alamosa	6,500	1-1-63	1 yr. 8 mos.	1%	123,059[g]	119,598[b]	3,461[b]	120,000[b]
Gunnison	Gunnison	4,000	9-1-63	1 yr.	1%	56,632[e]	55,500[b]	1,132[b]	70,000[b]
Aurora	Adams-Arap.	63,000	1-1-64	8 mos.	1%	301,358[h]	258,625[h]	42,733[h]	452,050[b]
Boulder	Boulder	46,000	8-1-64	1 mos.	1%	----------no records----------			887,562[b]
Grand Junction	Mesa	21,000	8-1-64	1 mos.	1%	----------no records----------			450,000[b]
Montrose	Montrose	5,300	8-1-64	1 mos.	1%	----------no records----------			130,000[b]
Colorado Springs	El Paso	82,500	6-1-65		2%	----------no records----------			2,800,000[b]
TOTAL		389,700							$6,445,809

a. Colorado State Planning Div., 1964 Population Estimates.
b. Estimated by officials of reporting municipality.
c. Actual collections to 8-30-64 reported by officials of Pueblo.
d. Actual collections to 8-14-64 reported by officials of Englewood.
e. Actual collections to 6-30-64 reported by officials of Littleton and Gunnison.
f. Actual collections to 7-31-64 reported by officials of Durango.
g. Actual collections to 7-19-64 reported by officials of Alamosa.
h. Actual collections to 9-2-64 reported by officials of Aurora.

APPENDIX A - PART 2

Financial Data Relating to Sales and Use Taxes Levied by Colorado's Home Rule Cities

City (1)	Population (3)	Assessed[i] Valuation (11)	Mill[i] Levy (12)	Yearly[i] Revenue From Property Tax (13)	Yearly Sales and Use Tax Collections (10)	Mill Levy[j] Equivalent of Yearly Sales Tax Revenue (14)	Yearly[j] Sales Tax Revenue Per Capita (15)	Limitations Imposed on Mill Levies (16)
Pueblo	96,000	$102,278,905	19.00	$1,943,299	$ 835,000[b]	8.16	$ 8.70	19.75[k]
Englewood	36,700	50,194,921	11.301	567,252	336,850	6.71	9.16	none
Littleton	17,700	34,926,645	8.60	300,369	189,347	5.42	10.70	none
Durango	11,000	15,804,625	13.11	207,199	185,000[b]	11.70	16.81	none
Alamosa	6,500	7,816,885	16.29	127,337	120,000[b]	15.40	18.46	none
Gunnison	4,000	3,560,530	15.26	54,333	70,000	19.70	17.50	none
Aurora	63,000	77,750,857	12.50	971,885	452,050	5.80	7.17	none
Boulder	46,000	75,480,150	14.71	1,110,313	887,562[b]	11.70	19.29	13.00[l]
Grand Junction	21,000	35,224,010	21.50	757,316	450,000[b]	12.80	21.42	none
Montrose	5,300	7,068,385	19.35	136,773	130,000[b]	18.40	24.52	none
Colorado Springs	82,500	123,435,890	17.10	2,110,753	2,800,000[b]	22.68	33.93	20.00[m]
TOTALS	389,700	$533,541,803		$8,286,829	$6,445,809			
Average Mill Levy Equivalent						12.59		
Average Mill Levy Per Capita							$17.14	

b. Estimated by officials of reporting municipality.
i. Colorado Tax Commission, Annual Report for 1963, pp. 124-127.
j. Calculations of Amici Curiae.
k. City of Pueblo Ord. No. 2189, Sec. 63, passed and approved November 8, 1955.
l. Charter of City of Boulder, Sec. 94.
m. Charter of City of Colorado Springs, Sec. 42

APPENDIX B

Financial Data Relating to Sales and Use Taxes Which Could Be Levied by Home Rule Cities Not Now Using this Revenue Source

City	County	Population[a]	State Sales Tax Collections[b]	Assumed Rate of Local Tax[c]	Amount of Local Sales Tax if Collected[d]	Assessed Value[e]	Mill Levy[e]	Yearly Revenue from Property Tax[e]	Mill Levy Equivalent of Projected Yearly Sales Tax Revenue[f]	Projected Yearly Sales Tax Revenue Per Capita[f]
Arvada	Jefferson	32,000	$ 549,012	1%	$274,506	$45,728,030	13.00	$594,464.39	6.00	8.58
Canon City	Fremont	9,500	278,258	1%	139,129	11,267,895	16.00	180,286.32	12.35	14.65
Cortez	Montezuma	7,000	317,715	1%	158,858	8,961,935	12.00	107,543.22	17.73	22.69
Craig	Moffat	4,300	202,268	1%	101,134	5,395,205	19.00	102,508.90	18.75	23.52
Delta	Delta	3,900	204,961	1%	102,281	4,125,540	17.00	70,134.18	24.79	26.68
Edgewater	Jefferson	5,100	53,574	1%	26,787	4,996,290	11.50	57,457.34	5.36	5.25
Fort Collins	Larimer	30,400	1,071,575	1%	535,788	36,419,740	15.00	546,296.10	14.71	17.62
Fort Morgan	Morgan	7,850	385,844	1%	192,922	11,906,520	8.00	87,252.16	16.20	24.58
Greeley	Weld	31,600	1,318,101	1%	659,051	43,312,030	17.75	768,788.53	15.22	20.86
Lafayette	Boulder	2,800	44,898	1%	22,496	2,233,980	14.33	32,012.93	10.07	8.03
Lamar	Prowers	7,850	315,324	1%	152,662	8,037,483	10.00	80,374.83	18.99	19.57
Longmont	Boulder	13,700	638,679	1%	319,389	24,326,660	12.50	304,083.25	13.29	23.31
Monte Vista	Rio Grande	3,625	210,035	1%	105,068	4,233,432	21.00	88,902.07	24.81	28.98
Rifle[g]	Garfield	2,175								
Sterling	Logan	11,400	519,950	1%	209,975	14,608,605	18.81	274,787.86	14.37	18.42
Westminster	Adams	16,100	587,585	1%	293,798	22,133,770	14.50	320,939.67	13.27	18.25
Wray	Yuma	2,100	89,699	1%	44,849	2,358,090	3.00	7,074.27	19.02	21.36
TOTALS		191,400	$6,575,210		$3,787,605	$252,432,445		$3,666,347		
Average Mill Levy Equivalent									15.31	
Average Revenue Per Capita										18.83

a. Colo. State Planning Div., 1964 Population Estimates

b. Supplied by Sales and Use Tax Division, Colo. Dept. of Revenue

e. Colorado Tax Commission, Annual Report for 1963, pp. 124-127.

f. Calculations of Amici Curiae