SUPREME COURT, STATE OF COLORADO

Case No. 94SA334

PETITION FOR WRIT OF MANDAMUS PURSUANT TO COLORADO CONSTITUTION ARTICLE VI, SECTION 3 AND C.A.R. 21, An Original Proceeding

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BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

STATE OF COLORADO, ex. rel. GALE NORTON, in her official capacity as ATTORNEY GENERAL FOR THE STATE OF COLORADO; AND ROY ROMER, in his official capacity as GOVERNOR OF THE STATE OF COLORADO,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY; RICHARD CLAUSSEN, in his official capacity as SHERIFF OF MESA COUNTY; BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY; and ED JORDAN, in his official capacity as SHERIFF OF WELD COUNTY,

Respondents.

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Date: November 28,1994

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Comes now the Colorado Municipal League (the "League") as amicus curiae and submits this brief in support of the position of the Respondents.

I. Interests of the League

The League is a voluntary non-profit association of 256 municipalities located throughout the state of Colorado, including all Colorado municipalities above 2,000 population and the vast majority of those having a population of 2,000 or less. The League's membership represents 99.9% of the municipal population of Colorado. The League has for many years appeared before this Court as amicus curiae to present the perspective of Colorado municipalities.

As local governments, municipalities are "districts" or "local districts" within the meaning of Article X, Section 20 of the Colorado Constitution, and accordingly their fiscal year spending is now limited by this amendment. In the interest of controlling fiscal year spending and restraining the growth of their respective governments, municipalities presumably enjoy a prerogative under Subsection 9 of this amendment to reduce or end their subsidies for state mandated programs. However, the instant case, along with the pending case of Romer v. Board of County Commissioners of the County of Weld, 94SC140, and the adoption by the Colorado General Assembly of Section 29-1-304.8, C.R.S., represent a concerted effort by the legislative and executive branches of the state government to effectively eviscerate Subsection 9 and preclude municipalities, counties, and other local governments from exercising this constitutional prerogative.

Although to date no municipality has invoked Subsection 9 to cut or eliminate local

funding for a state mandated program, such an action is virtually inevitable in the future whenever and wherever state requirements may overburden local resources. The construction of Subsection 9 made by this court in the pending cases will determine whether or not Subsection 9 has any real force and effect and will therefore resonate with municipalities for years to come.

II. Issues Presented for Review

1. Whether Colorado counties have authority, pursuant to Article X, Section 20 (9) of the Colorado Constitution, to reduce or end their statutorily mandated local subsidies for the provision and maintenance of state court facilities.

2. Whether Colorado counties and county sheriffs have authority, pursuant to Article X, Section 20 (9) of the Colorado Constitution, to reduce or end their statutorily mandated local subsidies for state court security and other state court services.

3. Whether Section 29-1-304.5, C.R.S. is unconstitutional both facially and as applied to the county subsidies at issue in this case.

III. Statement of the Case and Statement of Facts

The League hereby defers to any statement of the case or statement of facts which may be contained in the Respondents' answer to the Court's order to show cause, but would make

the following additional observations about the legal context of this case.

When Article X, Section 20, including provisions at Subsection 9 related to "State Mandates," was approved by Colorado voters on November 3, 1992, few of its provisions for restraining state and local fiscal affairs were absolutely unique. Numerous pre-existing constitutional and statutory provisions limited state and local government fiscal authority in a variety of ways. In fact Article X, Section 20 (1) expressly acknowledges the existence of "other limits" on government revenue and spending which henceforth may never be "weakened" without voter approval.

Especially germane to this case is a Colorado statute which already contained provisions addressing "state mandates" to local governments. For over a decade prior to the adoption of Article X, Section 20, the statutes contained language indicating that the state would not inflict unfunded mandates on local governments as formerly codified at Section 29-1-304, C.R.S. Then in 1991, a scant year and a half before the adoption of the constitutional amendment, the General Assembly replaced the aforesaid statute with a much stronger version at Section 29-1-304.5, wherein the legislature pledged itself to never impose any "new state mandate" on local governments without providing adequate money to pay the cost of the mandate, and adopted the following remarkably broad definition of "state mandate" at subsection 3 (d):

> "State mandate" means any legal requirement established by statutory provision or administrative rule or regulation which requires any local government to undertake a specific activity or provide a specific service which satisfies minimum state standards, including, but not limited to:
>
> (I) Program mandates which result from orders or conditions specified by the state as to what activity shall be performed, the quality of the program, or the quantity of services to be provided; and

(II) Procedural mandates which regulate and direct the behavior of any local government providing programs or services, including but not limited to, reporting, fiscal, personnel, planning and evaluation, record keeping, and performance requirements.

As adopted, this statute only applies prospectively and allows all local governments to simply refuse to perform any new unfunded state mandates. Section 29-1-304.5 (1), C.R.S. Like Subsection 9 of Article X, Section 20 which was adopted by Colorado voters the following year, this statute contains certain exceptions related to federal mandates and school districts, Section 29-1-304.5 (2) (a) and (c).

Echoing the terminology of the preexisting statute, Article X, Section 20 (9) is entitled "State Mandates." Like every other provision of Article X, it is self-executing, Article X, Section 20 (1). It expressly assigns to local districts the prerogative to determine whether to reduce or eliminate local funding for state programs. It assigns no role whatsoever to the State to determine what funding may be eliminated or to consent to the action of the local district.

Shortly after the adoption of Article X, Section 20 the General Assembly added two new sections to Title 29, Article 1 of the statutes, ironically juxtaposed with the aforesaid statute and its liberal definition of "state mandate." These new sections, 29-1-304.7 and 29-1-304.8, purport to implement Subsection 9. In its Petition for Writ of Mandamus, the State euphemistically refers to Section 29-1-304.8 as an effort by the General Assembly to "clarify" Subsection 9, when it is in fact an unabashed, unilateral declaration by the state that local governments "shall not" invoke their prerogative under Subsection 9 to cease funding several categories of state mandates.

IV. Summary of Argument

Article X, Section 20 (9) should be harmonized with pre-existing law and should be liberally construed to effectuate its obvious intent and the will of the voters who adopted it. In particular, only a liberal construction of local government prerogatives under Subsection 9 will "reasonably restrain most the growth of government."

The mandated local subsidies for state programs at issue in this case are obviously creatures of statutes, ergo they are products of the Colorado General Assembly and thus fall within the purview of Section 20 (9). The State cannot avoid the obvious implications of Article X. Section 20 (9) by legislative fiat, simply presuming to prohibit local governments from terminating their subsidies for state programs. Thus, Section 29-1-304.(8), C.R.S. should be declared unconstitutional.

V. Argument

A. Article X, Section 20 (9) should be liberally construed to effectuate its intent and purpose.

Article X, Section 20 is generally designed to constrain government taxation and spending and its self-described "preferred interpretation" is the one which "reasonably restrains most the growth of government." This Court has already acknowledged and applied this "preferred interpretation" twice in Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993) and Bickel v. Boulder, 18 Brief Times Reporter 1549 (Colo. 1994). In the latter decision, the Court noted, "the party seeking to invoke the 'preferred interpretation' has the burden of

establishing that its proposed construction of Amendment 1 would reasonably restrain the growth of government more than any other competing interpretation." 18 B.T.R. at 1556.

The League would submit that, in keeping with this principle, the prerogative of local governments to eliminate "subsidies" under Subsection 9 should be broadly and liberally construed. After all, what is the reduction of a subsidy if not a reduction in spending, i.e. exactly the sort of fiscal constraint that Article X, Section 20 was designed to promote? (Note that under Article X, Section 20 (7) (b) and (c) local government fiscal year spending bases are "adjusted," presumably downward, for "reductions" which occur pursuant to Subsection 9.)

More significantly, however, a broad reading of Subsection 9 will inhibit the "growth of government" by consistently encouraging the General Assembly to take fiscal responsibility for the programs it adopts and maintains. If it is too easy to pass the buck to local taxpayers to fund the programs and services the General Assembly wishes to promote, then state government, at least, will continue to mushroom. This was exactly the rationale for Subsection 9 as explained to the voters prior to the election in the Legislative Council's "Blue Book." While the Legislative Council's analysis is not dispositive, it provides important guidance for the court in construing initiated constitutional amendments, Carrara Place Ltd. v. Arapahoe County Bd. of Equalization, 761 P.2d 197 (Colo. 1988) and this Court has previously looked to the "Blue Book" for interpretive guidance on the meaning of Amendment 1 of 1992, Submission of Interrogatories on Senate Bill 93-74, 852 P.2d at 4. Here was one argument in favor of the adoption of Amendment 1 as explained to the voters in the Blue Book:

> 7) Local governments must be allowed to reduce or end their subsidies to state-mandated programs. The proposal prevents state government from forcing programs onto the local level without their approval and without proper funding. Thus, the proposal improves the ability of local governments and citizens to

control their own affairs and requires greater fiscal responsibility at each level of government.

Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals, 11 (1992).

It is the court's "duty whenever possible to give effect to the expression of the will of the people contained in constitutional amendments adopted by them." Submission of Interrogatories on Senate Bill 93-74, 852 P.2d at 10, quoting In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 189 Colo. 1, 536 P.2d at 308 (1975). Furthermore, in construing any constitutional provision, the court should consider the object to be accomplished and the mischief to be avoided by the provision at issue. People v. Y.D.M., 593 P.2d 1356, 197 Colo. 403 (Colo. 1979). As unpalatable as it may be for the State to accept, as worthy as any number of state mandated local expenditures may be, and as disruptive as the wholesale "turnback" of these mandates may be, the will of the voters as expressed in Subsection 9 is diametrically opposed to the sort of government "growth" which is endemic to unfunded mandates.

Another important rule of construction which has been enunciated by this Court and applied to Article X, Section 20 is the presumption that a constitutional amendment has been "framed and adopted 'in the light and understanding of prior and existing laws and with reference to them.'" Bickel v. Boulder, 18 B.T.R. at 1554; Carrara Place Ltd. v. Arapahoe County Board of Equalization, 761 P.2d at 202; Krutka v. Spinuzzi, 153 Colo. 115, 384 P.2d 928 (1963). This principle was extensively applied in the Bickel case to reach the conclusion that Amendment 1 had not altered the fundamental law allowing local governments to frame

general obligation debt ballot questions. Specifically, the Court held in Bickel that local governments could refer to definitions in existing law, including existing statutory law to construe terms which were undefined in the text of Article X, Section 20 itself, e.g. "consolidation," 18 B.T.R. at 1555, and "text," 18 B.T.R. at 1561.

With the exception of the term "district" none of the key words in Subsection 9 are defined in the amendment. This has led the State and the General Assembly in particular (as evidenced by the adoption of Section 29-1-304.8) to play word games with Subsection 9 in an effort to construe it into oblivion. They say, as in this case, that the program somehow "derives" from the Constitution, not the General Assembly, even where the particular activity, program or subsidy is set forth in statute. They argue that the activity, program or subsidy is one of the "inherent duties" of local government, thus begging the question of why then did the General Assembly find it necessary to set forth the mandate in statute? Or, as in the pending case of Romer v. Board of County Commissioners of the County of Weld, 94SC140, they split hairs over whether mandatory local payments are truly "subsidies" or whether a program has actually been "delegated."

For obvious reasons, the State is anxious to argue what a mandate is not for purposes of Article X, Section 20 (9). However, in this rush to effect damage control in the wake of the passage of Amendment 1, the State is running roughshod over one of the most fundamental tenants of statutory and constitutional construction--every amendment, indeed every word of every amendment is presumed to have some meaning and effect. De'Sha v. Reed, 572 P.2d 821, 194 Colo. 367 (Colo. 1977). It must have been intended to change something that the State was doing, else why would the voters have adopted it? In its preoccupation to avoid turnbacks

of costly programs, the State has yet to concede or identify what if any State mandated local expenditures may have been in the cross hairs of Amendment 1.

To comprehend the scope of the applicability of Subsection 9, the Court need look no further than the pre-existing statutory definition of "state mandate" as quoted above, Section 29-1-304.5, C.R.S. Article X, Section 20 (9) is denominated "State Mandates." While the wording in this caption is not dispositive, it may properly be used by the Court as an aid to determine what the framers and voters intended when they drafted and adopted this constitutional amendment. U.M. v. District Court, County of Larimer, 631 P.2d 165 (Colo. 1981). The term "state mandate" as it was understood under Colorado law prior to the adoption of Amendment 1 referred to an extremely wide array of "program mandates" and "procedural mandates" directed by the State to local governments and was almost boundless in its generality and inclusiveness.

Logically, Article X, Section 20 can also be read as being completely complementary to Section 29-1-304.5. The pre-existing statute expressly proscribed only new unfunded mandates from the General Assembly, i.e. it excluded "any state law enacted prior to the second regular session of the fifty eighth general assembly." Section 29-1-304.5 (2) (d). On the other hand, couched in terms of "reduce or end," Article X, Section 20 (9) was clearly intended to apply to mandates existing at the time of its adoption. Thus, Amendment 1 went further than the statute but was aimed at exactly the same phenomenon.

The League urges this court to determine what may fall under the rubric of "State Mandate" for purposes of Article X, Section 20 (9) in a manner which is consistent with prior law and which is most likely to limit the growth of government.

B. The Court should determine Section 29-1-304.8 to be unconstitutional.

The State has apparently taken the position that the fundamental constitutionality of Section 29-1-304.8 is at stake in this case, and argues that the statute must be presumed constitutional. Notably, the State did not list this as an issue presented for review in its Petition. However, the Petition is based squarely on the statute and the validity of the claims contained therein thus hinges on its constitutionality. The Court could not grant the Petition without effectively determining the statute to be constitutional. Conversely, a denial of the Petition would implicate a determination by the Court that the statute, at least as applied to the facts of this case, is unconstitutional.

The League's position is that the statute is facially unconstitutional. Article X, Section 20 (9) assigns no role whatsoever to the State to pick and choose which state mandated expenditures may be eliminated by local governments. Instead, it is fully self-executing. Colo. Const. Article X, Section 20 (1). As a self-executing constitutional amendment, it is supposed to be liberally construed to effectuate its purpose. Committee for Better Health Care for All Colorado Citizens by Schrier v. Meyer, 830 P.2d 884 (Colo. 1992). The General Assembly may legislate in the realm of self-executing constitutional amendments only to the extent that such legislation is designed to make the constitutional provision more effective. "(O)nly legislation which will further the purpose of the constitutional provision or facilitate its operation is permitted." Colorado Common Cause v. Anderson, 178 Colo. 1, 5, 495 P.2d 220, 221-222 (1972). Cf. Yenter v. Baker, 126 Colo. 232, 248 P.2d 311 (1952); In re Interrogatories Propounded by Senate Concerning House Bill 1078, supra, 536 P.2d at 314.

The statute at issue in this case does just the opposite, severely limiting the practical utility of Subsection 9 for any local government concerned with controlling fiscal year spending. The General Assembly has created from whole cloth an implied exception to Subsection 9 for programs which are "inherent" to a particular officer or office under the Constitution. This nebulous approach is obviously favored by the State for it would allow ad hoc "refusals" each and every time a local government attempts to invoke its prerogative to eliminate local funding for a state program. Even if, as in this case, the program or activity has been prescribed by the legislature by statute, the State may argue that the statute is essentially superfluous because the function was "inherent" to that particular unit of government in the first place.

To the extent the statute goes on to except from the purview of Article X, Section 20 (9) programs which are "required by the state constitution to be administered by the local district, including but not limited to maintenance of the state court system," it remains something of a mystery how this proposition squares with reality. The Colorado Constitution simply does not expressly "require" counties or any other unit of local government to subsidize the state court system.

(Although not particularly at issue in this case, Subsection 29-1-304.8 (2) is another especially egregious example of the General Assembly's disregard for the anti-mandate provisions of Amendment 1. Therein, the General Assembly goes so far as to suggest that local governments may be compelled to pay the salary of any state employee, and the local government would have no redress under Article X, Section 20 (9) because this scenario would not involve a "program delegated for administration.")

From the outset the General Assembly has apparently harbored doubts about the constitutionality of Section 29-1-304.8, as evidenced by the four-part interrogatory propounded to the Court on this one section alone in 1993. See: Submission of Interrogatories on Senate Bill 93-74, supra, n. 1. While it may be true that Section 29-1-304.8, having now been adopted, should be presumed constitutional, the General Assembly should not be permitted to eviscerate this or any other provision of the Constitution under the guise of "clarifying" an initiated constitutional amendment. The construction of a constitutional amendment by the legislative branch of government is not absolutely controlling. Watrous v. Golden Chamber of Commerce, 218 P.2d 498, 121 Colo. 521 (1950). Legislative construction cannot abrogate the plain meaning of a constitutional amendment approved by the people. Colorado State Civil Service Emp. Assn. v. Love, 448 P.2d 624, 167 Colo. 436 (1968).

VI. Conclusion

WHEREFORE, the League respectfully urges this Court to deny the State's Petition for Writ of Mandamus and to declare Section 29-1-304.8 unconstitutional.

Respectfully submitted this 28th day of November, 1994.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League to Appear as Amicus Curiae was placed in the U.S. Postal System on the 28th day of November, 1994 addressed to the following:

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