DATE FILED: December 19, 2016 5:07 PM
FILING ID: D0DF6E6A65953
CASE NUMBER: 2016SC455

SUPREME COURT, STATE OF COLORADO Court Address: 2 E. 14th Avenue Denver, Colorado 80203	
Colorado Court of Appeals, Case Nos. 2014CA2099 and 2014CA2463, The Honorable Donald W. Marshall, Opinion by Judge J. Jones; Webb and Booras, JJ. Concur	
Arapahoe County District Court Case No. 11CV1076 Honorable Donald W. Marshall	
Petitioners: UMB BANK, N.A.; COLORADO BONDSHARES – a Tax Exempt Fund; MARIN METROPOLITAN DISTRICT, a Colorado Special District. v. **Respondent:** LANDMARK TOWERS ASSOCIATION, INC., a Colorado nonprofit corporation, by EWP-GV, LLC, as receiver for 7677 EAST BERRY AVENUE ASSOCIATES, LP, its Declarant.	▲COURT USE ONLY▲
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BRIEF OF THE SPECIAL DISTRICT ASSOCIATION OF COLORADO AND THE COLORADO MUNICIPAL LEAGUE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS UMB BANK, N.A., COLORADO BONDSHARES AND MARIN METROPOLITAN DISTRICT

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. Specially, the undersigned certifies that:

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

☒ It contains 2,745 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.

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COMES NOW the Special District Association of Colorado (the "SDA") and the Colorado Municipal League (the "CML"), and by and through undersigned counsel and pursuant to C.A.R. 29, hereby submit this brief as *amici curiae* in support of the Petitioners: UMB Bank, Colorado Bondshares and Marin Metropolitan District (the "District").

INTRODUCTION AND INTERESTS OF AMICI

The Special District Association (the "SDA") is a Colorado nonprofit corporation formed in 1975. The SDA's purpose is to preserve and enhance the legal and political environment for the existence and successful operation of the special district form of government, and to assist special districts in operating efficiently and appropriately. The SDA's members include 1,611 special districts (975 of which are metropolitan districts) organized under C.R.S. §32-1-101, *et seq.* (2016) ("Title 32" or the "Special District Act"). The Colorado Department of Local Affairs lists 1,530 active metropolitan districts formed under and governed by the Special District Act. *See* COLORADO DEPARTMENT OF LOCAL AFFAIRS, Active Local Governments by Type https://dola.colorado.gov/lgis/lgType.jsf;jsessionid%20=cb376b551d17001a83a8d9d44aba (last visited December 19, 2016). Accordingly, the SDA represents the

interests of approximately 60% of the Title 32 metropolitan districts currently in existence.

The Colorado Municipal League ("CML" or the "League", and with the SDA, the "Amici Parties") was formed in 1923. The 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 city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. Participation by the League is intended to provide the Court with a statewide municipal perspective because the outcome of this case will likely impact all cities and towns in Colorado.

The Amici Parties have a genuine interest in the impact on their members of certain determinations that were made by the court of appeals in *Landmark Towers Ass'n, Inc., v. UMB Bank, N.A., et al*, April 21, 2016 (Case Nos. 14CA2099 & 14CA2463) (the "Opinion") regarding the Taxpayer's Bill of Rights ("TABOR") election held in connection with the organization of the Marin Metropolitan District (the "District"), and the electors who voted in the TABOR election. Municipalities have two main interests related to the holdings in the Opinion:

(a) municipalities regularly conduct TABOR elections and rely on the statutes of limitations at issue in the Opinion to give certainty to those elections, and (b) municipalities often support the creation of special districts within their boundaries to assure that growth pays its own way and does not impact other taxpayers or municipal general funds. Municipalities and special districts have worked in conjunction for decades to provide infrastructure to their overlapping constituencies in an efficient and cost-effective manner. Many of CML's members partner with special districts in this way, and have a direct interest in the continued capacity of special districts to finance, construct, operate and maintain infrastructure for the good of the membership of both CML and the SDA. Some members of municipal governing bodies serve as directors of special districts and are qualified to do so by way of purchase agreements similar to those at issue in this case.

The determinations made in the Opinion have resulted in uncertainty as to the valid conduct of TABOR elections held by both special districts and municipalities, and have upended the long-standing and statutorily-recognized manner in which electors have been qualified to vote in special district elections. The members of both Amici Parties have an interest in the finality of these

elections to ensure that voter-approved taxes and bonds are not subject to challenge years after such elections have been held.

Access to credit markets hinges on the certainty of the revenues pledged to the repayment of bonds, and without that certainty, borrowing could become too expensive or unavailable altogether. Thus, special districts and municipalities may not be able to fulfill one of their primary essential public functions – that of the provision of public infrastructure. According to the 2012 Census of Governments, which uses a broad definition of special districts including metropolitan districts but excluding school districts, special districts in Colorado spent $1,546,800,000 on capital outlay. (Source: Don Merrion, State of Colorado Division of Local Affairs).

ARGUMENT

A. The ten-day period in which to contest an election under Section 1-11-213(4), C.R.S. (2016) of the Election Code barred the respondents' challenge to the District's TABOR election in this case

The court of appeals held that the failure of the District organizers to provide a TABOR notice to the 130 Landmark purchase contract holders (the "Landmark Buyers"), whom the court deemed "eligible electors," created a substantive constitutional claim, and therefore, the ten-day time limit in C.R.S. §1-11-213(4) did not bar Landmark from challenging the election. Opinion at ¶48. In doing so,

the appellate court improperly characterized this Court's ruling in *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J,* 92 P.3d 453 (Colo. 2004), as holding that a defect in the election process created a substantive constitutional claim, rather than a procedural challenge that was subject to the ten-day limit in C.R.S. §1-11-213(4). Opinion at ¶47. The 10-day time frame in C.R.S. §1-11-213(4) is a strictly construed statute of limitations and cannot be extended. *Vailes v. Brown,* 27 P. 9145 (Colo. 1891).

Here, Landmark's challenge relates to the fact that the Landmark Buyers never received a TABOR notice, which is similar to the misinformation contained in the TABOR notice in *Cacciopo*: both challenges involve defects in the election *procedure*. In *Cacioppo,* this Court held that because the claim challenged the accuracy of the form and content of the TABOR notice, rather than the substantive issue of whether the school district had the legal or constitutional authority to levy the tax in the first place, the claim was *procedural*.

In the present case, there is no allegation that the District electors passed an illegal tax, kept revenues in violation of the TABOR limits, or that the ballot language as passed cannot stand because it was unconstitutional – claims that would be substantive in nature. Setting aside the fact that the Landmark Buyers were not eligible electors in the first place under a plain reading of the statute and

therefore were not entitled to receive a TABOR notice, as will be discussed later in this brief, the failure of the proponents of the District to send the Landmark Buyers a TABOR notice is a *procedural*, not substantive, defect. The proponents obtained approval of the District service plan from the City of Greenwood Village after a public hearing, published the notice of the election, posted the election notice in the office of the designated election official and otherwise complied with the applicable constitutional and statutory requirements in the conduct and organization of the TABOR election. Even if they had been electors, the Landmark Buyers received constructive notice of the election by other methods. The preparation and distribution of a TABOR notice is but one of many required election tasks. Taken as a whole, the proponents of the District substantially complied with the applicable constitutional and statutory election requirements.

The impact of the Opinion extends beyond special districts. If the court of appeals is correct in its determination that defects in the TABOR notice and the election process are substantive in nature, rather than procedural, every time an election official makes an error in a required notice or otherwise does something that creates a defect in the election process, the election will be subject to challenge at any time. For example, if a municipal clerk or hired vendor inadvertently omits

a zip code in the mailing of TABOR notices, the Opinion allows a challenge to the entire election to occur at any time.

Accordingly, Landmark's challenge to the TABOR election should be barred by C.R.S. §1-11-213(4).

B. The thirty-day limitations period in C.R.S. §11-57-212 of the Supplemental Public Securities Act barred the respondents' challenge to the special district's TABOR election

Landmark is challenging the District's ability to levy taxes, which is a necessary component of bond issuance proceedings. C.R.S. §11-57-212 requires challenges to the "legislative acts or proceedings in connection with the authorization or issuance of" bond issues be brought within 30 days of authorization of the bonds. The appellate court incorrectly concluded that the time limits in both C.R.S. §1-11-213(4) and C.R.S. §11-57-212 did not foreclose Landmark's claims because such a bar would limit the Landmark Buyers' constitutional rights under what the appellate court erroneously styled a four-year statute of limitations under TABOR. Opinion at ¶49. The appellate court cites a remedial provision in TABOR that requires illegally collected, kept or spent revenue to be refunded for a period of four years prior to the filing of a suit. COLO. CONST. ART. X, §20(1). The four-year period is not a statute of limitations; rather,

it is a remedial provision. TABOR is procedural only, and does not create any fundamental rights. *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110 (Colo. 1996).

The 10- and 30-day time limits operate to provide for the efficient and conclusive administration of elections. Exposing election procedures to almost infinite challenges will disrupt and confuse government operations and unduly restrict the ability to financially function. Since the passage of TABOR in 1992, Colorado municipal electors have voted on almost 2,000 ballot issues. Telephone Interview with Tami Yellico, Municipal Legal Services Manager, Colorado Municipal League (December 2016). In the November 2016 election alone, 38 special districts conducted TABOR elections. Telephone Interview with Ann Terry, Executive Director, Special District Association of Colorado (December 2016).

C. The special district's organizers' contracts made them eligible electors under Section 32-1-103(5)(b), C.R.S. of the Special District Act

In 1970, the General Assembly authorized the use of purchase contracts that obligate a purchaser of taxable property to pay property taxes during the pendency of the contract as a means of creating eligible electors for special district elections. *See* Section (2) of Part 8, Article 17, Chapter 89 (1970); *see also* C.R.S. §32-1-103(5)(b). The language of Section (2) of Part 8, Article 17, Chapter 89 (1970) is

largely identical to that of the current statute, C.R.S. §32-1-103(5)(b), and together they have been used for over 45 years to qualify electors to vote in special district elections, including metropolitan district elections. C.R.S. §32-1-808, which governs the circumstances under which electors can be qualified through the use of such purchase contracts, was added in its entirety to the Colorado Revised Statutes in 2006 (coincidentally, the year before the District was organized), indicating that the General Assembly had recently considered and affirmed the qualification of electors in this manner under the circumstances set forth in C.R.S. §32-1-808.

A plain reading of C.R.S. §§32-1-103(5)(b) and -808 indicates the General Assembly's clear intent to allow for the qualification of electors in special district elections where none existed before. The qualification of electors through a purchase contract that obligates the purchaser to pay property taxes during the pendency of the contract is a hallmark of the Special District Act.

The court of appeals decision suggests that in order to truly qualify an elector, a contract to purchase taxable property within a district must close and convey ownership to the elector within some finite period of time. The exact parameters of this new requirement for a timely closing and conveyance are undefined and create uncertainty out of what has been a settled tool for public development and finance throughout the state. The alternative the court of appeals

suggests, with such contracts actually closing and conveying real property ownership to special district electors, brings with it a host of complications. How will an election official know if a contract purchase holder voted in the special district election on November 8, 2016, but never closed on the property? How would this impact the election? The court of appeals is substituting its own judgment of a valid contract for the statutes created by the General Assembly. Many Colorado citizens rely on the use of purchase contracts to qualify electors and provide public infrastructure. The bad facts in this case must not unfairly color the valid uses of these types of contracts to qualify electors in many special districts.

D. The special district's TABOR election was not conducted illegally because the respondents were not eligible electors under Section 32-1-103(5)(b), C.R.S. of the Special District Act, and were not entitled to receive notice of the election under TABOR

The improper determination of the court of appeals that the Landmark Buyers *were* eligible electors will create problems for all special districts. Under the court of appeals' analysis, all persons who have entered a contract to purchase taxable property are now eligible electors, even if they are not obligated to pay taxes prior to closing. Most purchase contracts, like those held by the Landmark Buyers, only require the payment of prorated taxes at the time of closing. If the court of appeals is correct in its conclusion that the Landmark Buyers who were

obligated to pay prorated taxes at closing are electors, then the General Assembly did not need to mention payment of property taxes in C.R.S. §32-1-103(5)(b), since almost all standard purchase contracts provide for the proration of taxes at closing. COLORADO REAL ESTATE COMMISSION, Contract to Buy and Sell Real Estate, available at https://www.colorado.gov/pacific/dora/division-real-estate-contracts-and-forms (last visited December 16, 2016). The General Assembly could simply have said that "A person who is under a contract to purchase taxable property situated within the boundaries of the special district or the area to be included within the special district shall be considered an owner within the meaning of this subsection (5)" rather than what it did say in C.R.S. §32-1-103(5)(b) (emphasis added):

> A person who is **obligated to pay taxes** under a contract to purchase taxable property situated within the boundaries of the special district or the area to be included within the special district shall be considered an owner within the meaning of this subsection (5) . . .

As a matter of statutory construction, the Court must give meaning to each word. *See* C.R.S. §2-4-201; *Johnston v. City Council*, 493 P.2d 651 (Colo. 1972).

In large, established districts like West Metro Fire Protection District, Highlands Ranch Metropolitan District, and South Suburban Park and Recreation District, there could be hundreds of such purchase contracts in existence at any given time. Election officials cannot identify recipients of required TABOR

notices because these purchase contracts are rarely recorded. Thus, the validity of TABOR elections remains open to challenge if the court of appeals reasoning stands.

Unless there is a mandate that requires contract purchasers to affirmatively identify themselves, election officials will not know of the existence of all potential electors in a special district election. The court of appeals has effectively created an insurmountable duty for election officials, who must now grapple with uncertainties and matters of first impression in the conduct of special district elections.

CONCLUSION

The Opinion has created uncertainty in the validity of local government elections and in the finality of the determinations of those entities to issue debt. These factors will impede the ongoing ability of local governments to provide much-needed public infrastructure in a cost-effective manner, and the additional financial burden will fall on the shoulders of the taxpayers. The spectre of electors who cannot readily be identified creates an undue burden, if not an impossible task, for election officials. The Amici Parties respectfully request that the Court hold as follows:

a. The court of appeals erred in holding that the ten-day period in which to contest an election under section 1-11-213(4), C.R.S. (2016) of the Election Code does not bar the respondents' challenge to the special district's TABOR election in this case.

b. The court of appeals erred in holding that the thirty-day limitations period in section 11-57-212, C.R.S. (2016) of the Supplemental Public Securities Act does not bar the respondents' challenge to the special district's TABOR election in this case.

c. The court of appeals erred in holding that the special district's TABOR election in this case was invalid because the special district's organizers' contracts did not make them eligible electors under section 32-1-103(5)(b), C.R.S. of the Special District Act.

d. The court of appeals erred in holding that the special district's TABOR election in this case was conducted illegally because the respondents were eligible electors under section 32-1-103(5)(b), C.R.S. of the Special District Act who did not receive notice of the election as required under TABOR.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of the Special District Association of Colorado and the Colorado Municipal League as *Amici Curiae* in Support of the Petitioners UMB Bank, n.a., Colorado Bondshares and Marin Metropolitan District was filed via ICCES and served electronically, on the 19th day of December, 2016, to:

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