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District Court, City and County of Denver, 2014CV34803

Petitioners/Cross-Respondents:

Wayne W. Williams, in his official capacity as Secretary of State; Colorado Department of State; and State of Colorado;

v.

Respondent/Cross-Petitioner:

National Federation of Independent Business

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Supreme Court Case No: 2017SC368

BRIEF OF CITY AND COUNTY OF DENVER AND THE COLORADO MUNICIPAL LEAGUE AS *AMICI CURIAE* IN SUPPORT OF THE SECRETARY OF STATE

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 4185 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.

CITY AND COUNTY OF DENVER
COLORADO MUNICIPAL LEAGUE

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The City and County of Denver ("Denver") and the Colorado Municipal League ("CML") by undersigned counsel and pursuant to C.A.R. 29, submits this brief as *amici curiae* in support of Petitioners/Cross-Respondents, Wayne W. Williams, in his official capacity as Secretary of State; Colorado Department of State; and State of Colorado (collectively, "Secretary").

INTERESTS OF AMICI CURIAE

Denver is the state's largest municipality, the capital city of the state, and the state's original home rule city and county expressly organized and empowered pursuant to Article XX of the Colorado Constitution.

CML was formed in 1923. The League is a non-profit, voluntary association of 270 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, 169 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.

Long before the adoption of Article X, Section 20 of the Colorado Constitution ("TABOR") in 1992, Denver and every other municipality in the state imposed regulatory fees similar the Secretary of State fees being tested in this case, as well as many other forms of user fees, admission fees, service charges, monetary

exactions on development, and utility rates, all of which may fall under the umbrella term "fee." Likewise, municipal fees that predated TABOR have often been adjusted or increased since the adoption of TABOR. Municipal officials have always been keenly aware of the need to legally distinguish a tax from a fee, due to the fact that TABOR requires voter approval for any adoption of a new tax or increases do an existing tax but is silent in regard to fees.

Thus, this case is important to Denver and every other Colorado municipality. Not only will the case likely provide additional guidance on the distinction between taxes and fees, but also the court will potentially address these questions of first impression: How does TABOR affect state and municipal fee regimes that predated TABOR? Is it ever possible for a state or local charge that originated as a lawful "fee" prior to TABOR to somehow be converted into a "tax" due to changed circumstances over time, such that the charge cannot be increased without voter approval?

Following closely on the heels of this court's recent decision in *Colorado Union of Taxpayer's Foundation v. City of Aspen*, 418 P.3d 506 (Colo. 2018), upholding a municipal regulatory fee in the face of a TABOR challenge, the instant case affords the court another opportunity to clarify, not only the distinction between "fees" and "taxes,' but also the distinction between "regulatory fees" and "user fees"

under Colorado decisional law. Elucidation of this distinction will allow municipalities to better understand their obligation to craft and administer fees that do not run afoul of TABOR's voter-approval requirements.

ARGUMENT

A. TABOR does not directly restrict the adoption of new fees or fee increases, or alter the distinction between "fees" and "taxes."

TABOR is most commonly understood as a tax limitation measure, particularly the provision of the constitutional amendment that requires voter approval for new or increased taxes. Colo. Const., Art. X, Sec. 20(4)(a). However, as this court recently observed, "while TABOR defines seven terms, notably absent is a definition of 'tax.'" *City of Aspen*, 418 P.3d at 512. Equally notable, TABOR is completely silent on the subject of "fees" assessed by the state and local governments. Consequently, municipal officials and the courts understand that the distinction between "taxes" and "fees" for purposes of interpreting TABOR relies on decisional law that predates the adoption of TABOR in 1992.

It is instructive to note that previous versions of "The Taxpayer's Bill of Rights" defeated by Colorado voters in 1988 and 1990 *did* include an express requirement for voter approval of "fee" increases as well as "tax" increases in certain circumstances. For example, the 1988 version would have restricted government fee increases to the rate of inflation absent voter approval. Legislative Council of the

Colo. Gen. Assembly, *An Analysis of 1988 Ballot Proposals,* Research Pub. No. 326 at 11-16 (1988). The "Arguments For" this provision included the following explanation: "The proposal contains various safeguards which will maintain a necessary balance in government revenues. Replacing lost tax revenue with higher fees is prevented because fee increases above the inflation rate will require voter approval." *Id.* at 15.

While the version of TABOR ultimately adopted by Colorado voters in 1992 no longer contained a voter-approval requirement for fee increases, the authors of the constitutional amendment included instead strict formulaic limits on overall annual increases in revenue and spending, and a mandatory refund mechanism for revenues exceeding these limits. Colo. Const. Art. X, Sec. 20(7). From the outset, municipal officials recognized that TABOR's revenue and spending caps applied to all municipal revenues not otherwise excepted from the definition of "fiscal year spending" set forth in Colo. Const. Art. X, Sec. 20(2)(e), which would include all tax revenue and virtually all regulatory fee revenue. This court would later endorse the "single coffer" model of understanding and applying TABOR's revenue and spending caps, a model in which tax revenue and fee revenue are essentially blended. *Barber v. Ritter,* 196 P.3d 238, 250-251 (Colo. 2008).

Consequently, TABOR's revenue and spending caps discourage governments from going wild with fee increases that may run afoul of the caps, or cynically structure new and creative types of fees that are really "taxes in disguise" to evade the TABOR voter-approval requirement for new taxes. On the contrary, in periods of robust tax revenue growth (which describes most of the last quarter-century in Colorado) the TABOR caps may compel the government to suppress fee revenue. This explains why the state adopted C.R.S. § 24-75-402 to require the reduction of fees supporting the Secretary's cash fund and other state cash funds to maintain TABOR compliance.

However, to repeat, the version of TABOR adopted in 1992 did not *directly* require voter approval for fee increases. Nor did it impose any new or different requirements for how municipalities must justify new or increased fees, to distinguish them from taxes, or account for fees once they are collected. Consequently, Denver and other municipalities have continued to account for fee revenue and provide for periodic adjustments in their fees since the adoption of TABOR in much the same manner as they did before 1992, similar to the way the Secretary has continued to administer his fees in accordance with his pre-TABOR statute, C.R.S. § 21-24-104. As explained in Part D, below, TABOR should not be

interpreted to disrupt fee regimes that pre-dated TABOR and complied with prior law because, on its face, it was never intended to do so.

B. At least two distinct types of "fees" are recognized under the common law--"regulatory fees" and "user fees," both of which are distinguishable from a "tax."

Denver and CML support the Secretary in his argument that the fees funding the operations of his department are regulatory in nature, and not general revenue-raising measures in the nature of a tax. In *City of Aspen*, the court upheld the city's "waste reduction fee," analyzing it as a type of "regulatory fee" that reflected an exercise of Aspen's police power, and applying the proper standard for distinguishing regulatory fees from taxes: "when a government exercises its authority pursuant to its police power to regulate for health and safety, and imposes a charge as part of a regulatory regime, and the charge is reasonably related to the direct or indirect cost of regulating the activity, such a charge is not a tax subject to voter approval." *Id.* at 418 P.3d 509. However, in reaching this conclusion, the court somewhat blurred the distinction between "regulatory fees" and "user fees," both of which are distinguishable from taxes, but in somewhat different ways. The leading treatise on municipal law explains the difference as follows:

> In determining whether a charge imposed by a municipality or a state or local board functions as a fee, rather than an invalid tax, there are two types of fees: user fees, where a fee is assessed for the use of the governmental entity's property or services; and regulatory fees, where

> a fee is assessed as part of government regulation of private conduct. User fees are payments given in return for a government provided benefit. . . .
>
> A regulatory fee is enacted for purposes broader than the privilege to use a service or to obtain a permit; rather, regulatory programs are for the protection of the health and safety of the public. Fees charged in connection with regulatory activities that do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and that are not levied for unrelated revenue purposes are valid regulatory fees; courts must examine the costs of the regulatory activity and determine if there was a reasonable relationship between the fees assessed and the costs of the regulatory activity. However, a regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors; the question of proportionality is measured collectively, considering all rate payors. The legislative body charged with enacting laws pursuant to the police power retains the discretion to apportion the costs of regulatory programs in a variety of reasonable financing schemes; an inherent component of reasonableness in this context is flexibility. . . .
>
> Simply because a charge is not a tax does not always mean that it is a regulatory fee. Municipalities may charge fees that are not purely regulatory in nature, which are only one subset of a user charge; a use charge is a broad term that describes other types of charges such as commodity charges, burden offset charges, and special assessments. For these various types of fees, a test that only determines whether a charge is a tax or a regulatory fee is too limited. Simply because a charge is not a tax does not always mean that it is a regulatory fee. . . .

E. McQuillin, *Municipal Corporations,* § 44:24 (3d ed.2004).

Before the decision in *City of Aspen,* most of the appellate court jurisprudence in Colorado testing the legitimacy of a fee or distinguishing a "fee" from a "tax" centered on classic "user fees" or "service charges" rather than true regulatory fees.

For example, neither of the seminal cases in the 1980s upholding Denver's sanitary sewer fees or storm drainage assessments, *Loup-Miller Construction v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984) or *Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986) analyzed the charges as being associated with an exercise of the police power. Instead, both cases analyzed the charges as utility fees paid in exchange for municipal water, sewer and drainage services. The charges in both cases were upheld and distinguished from taxes because they were authorized by C.R.S. § 31-35-402(1)(f) which allows municipalities to collect "rates, fees, tolls and charges . . . from any consumer or any owner or occupant of any real property connected therewith or receiving service therefrom." A few years later, when the City of Fort Collins crafted an innovative way to provide additional funding for street maintenance, they coined it a "transportation *utility* fee" and justified it as a fee for service, without clear delineation of a specific regulatory or police power objective with which the fee was associated.

In these and other cases, when the appellate courts in Colorado have upheld "user fees" and distinguished such fees from "taxes," one element of the analysis is whether or not persons who are required to pay the fee receive a service or benefit or is "reasonably likely to benefit" from the service for which the fee is assessed, and whether the fee is proportional to that benefit. *Anema v. Transit Construction*

Authority, 788 P.2d 1261, 1267 (Colo. 1990). Other "user fee" cases decided by this court focus extensively on whether the challenged fee is fair and reasonable *from the perspective of the fee payer*. See, e.g. *Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver*, 928 P.2d 1254 (Colo. 1997) (challenging fairness of out-of-city wholesale water rates); *Krupp v. Breckinridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (challenging a wastewater plant investment fee).

In sharp contrast, as explained in the excerpt from McQuillin above, a determination of "benefit" to the individual fee payer is *not* an element of evaluating a valid regulatory fee, because regulatory fees exist to serve the broader public good associated with regulating private conduct, not to deliver "services" to the fee payer. Thus, the focus for regulatory fees is whether the aggregate amount of fee revenue collected is reasonable in light of the overall direct and indirect costs of the regulatory program with which the fee is associated. Denver and CML support the Secretary's position that the "regulatory program" supported by the fees collected by the Secretary is the entire department of state, as the cash funding structure for the department was conceived before the adoption of TABOR in C.R.S. § 24-21-104.

Prior to the decision in *City of Aspen*, the case law addressing "regulatory fees" in Colorado was relatively scant but still illuminating. The decisional law tends to focus on regulatory fees associated with licensing and permits. For example, in *Walker v. Bedford*, 26 P.2d 1051, 1053 (Colo. 1933), the court laid down the basic rule, "The exaction of a license fee with a view to revenue is not the exercise of the police power but of the power of taxation." Then in *Houston v. Kirschwing,* 184 P.2d 487, 490 (Colo. 1947), the court clarified, "While it is not fatal to such a (licensing) ordinance that the fees produced are in excess of the expense or regulation and enforcement, still the one must bear reasonable relationship to the other."

In *Heckendorf v. Town of Littleton*, 286 P.2d 615, 617-618 (Colo. 1955), the court struck down a municipal fee for a curb cut permit because the ordinance establishing the fee was disassociated from any regulatory purpose. "The vitality of the ordinance herein involved must rest in the police power as a regulatory measure as set forth in the ordinance by its terms. The total absence of any such regulation strips the ordinance, insofar as the defendant herein is concerned, or this label and leaves the naked truth to be merely a taxation for revenue upon the right of ingress and egress to and from private property which is illegal . . . ." The court later echoed this sentiment in *Cherry Hills Farm v. City of Cherry Hills Village*, 670 P.2d 779,

782 (Colo. 1983) when it noted in *dicta* that a so-called "service expansion fee" could not pass muster as a regulatory fee when, "There is no mention of any regulatory function in the ordinance" creating the fee.

Meanwhile, a similar approach to analyzing the fundamental nature of "regulatory fees" was emerging in the Tenth Circuit. In *Marcus v. Kansas Department of Revenue*, 170 F.3d 1305 (10th Cir. 1999) the court determined that a statutory charge for a handicap parking placard was a regulatory fee and not a tax because the charge "is expressly tied to the administrative costs of a specific regulatory scheme and, therefore, its essential character is regulatory." Id., 170 F.3d at 1312. In contrast, the same court reached the opposite conclusion in regard to a purported "fee" charged for specialty license plates, determining that the charge was actually a "tax" because it served no regulatory purpose. *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007).

After the adoption of TABOR, municipalities received important guidance from the Colorado Court of Appeals on the scope of "direct and indirect" costs that can be factored into a regulatory fee regime to distinguish such fees from taxes in *Bainbridge, Inc. v. Board of County Commissioners of Douglas County*, 964 P.2d 575 (Colo. App. 1998); cert. denied (1998). The court explained, "we do not read *Bloom* as holding that a fee imposed for building department services may not

exceed the direct costs required to operate the building department. Instead, we agree with the County that indirect costs, including, for example, services furnished by the county manager, the county attorney's office, the assessor's office, and various other divisions of county government, may be calculated in determining the present operational cost and future expansion of the building department. In our view, these costs are part of the 'overall costs' required to operate that department." *Id.*, 964 P.2d at 577.

Then in *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008), a case analyzing the transfer of revenue from both regulatory fees and user fees to the state general fund, this court clarified that there is no iron rule in Colorado restricting the expenditure of fee revenue to the purpose for which it was originally collected. "The fact that the fees were eventually transferred to the General Fund does not alter their essential character as fees because the transfer does not change the fact that the primary object for which they were collected was not to defray the general cost of government. At most, the transfer of fees to a general fund where, as here, the statutes authorizing assessment of those fees do not contemplate the generation of revenue for general use, 'incidentally' makes funds available to defray the general cost of government. As our precedent states, such incidental defraying of general governmental expense

does not transform a fee into a tax." *Id.*, 196 P.3d at 250, citing *Western Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 158.

In sum, the analytical framework for distinguishing regulatory fees from taxes, culminating in the holding in *City of Aspen*, supports the conclusion that the fees collected by the Secretary cannot be challenged as "taxes."

C. Municipalities administer many types of regulatory fees and user fees that are subject to mandatory requirements for increase or adjustment, but such adjustments do not trigger a voter approval requirement under TABOR.

The typical model in municipalities is for a regulatory function—whether it be administration of building permits, enforcement of animal control laws, or issuance of liquor and marijuana licenses--to be funded through a combination of fee revenue and general fund support, as was true with the waste-reduction program that was the subject of the *City of Aspen* case. *Id.*, 418 P.3d at 510. On the other hand, municipal services that subsist solely on user fees such as municipal utilities and other "enterprises" are often, by necessity, structured to be entirely self-sufficient and walled-off from any general fund support in a manner that resembles the fiscal structure imposed upon the Secretary's office by C.R.S. § 24-21-104(3)(b).

It is quite common in Denver and elsewhere for laws authorizing municipal regulatory fees to include automatic escalators or other provisions for periodic

adjustment of the fees to help cover the costs associated with the regulatory program in question, provisions that resemble the statutory requirements imposed upon the Secretary to periodically adjust his fees.

For example, in Denver animal control regulatory fees are subject to a CPI adjustment every three years. § 8-9, Denver Revised Municipal Code ("D.R.M.C.") Likewise, an ordinance imposing an affordable housing linkage fee on new development is subject to an automatic CPI adjustment every year. § 27-153(d), D.R.M.C. Other Denver development impact fees are subject to annual adjustment based upon the Colorado Department of Transportation Composite Construction Index. § 50-60(c), D.R.M.C. Certain regulatory fees related to street vending are required to escalate annually commensurate with the average increase in city employee salaries. §§ 49-544(2), 49-550.5(2)(b), 49-549.5(2)(b), D.R.M.C.

Fee adjustment provisions in other municipalities bear an even stronger resemblance to the Secretary's statutory mandate to adjust regulatory fees to cover costs. For example, ordinances in Aurora and Thornton establishing the application fees for retail marijuana licenses include the following provision: "At least annually, the amount of fees charged pursuant to this section shall be reviewed and, if necessary, adjusted to reflect the direct and indirect costs incurred by the city in connection with the administration, regulation, and enforcement of this article,

including costs of random inspections." § 6-315(b), Aurora Municipal Code, § 42-722(a), Thornton Municipal Code. Like the Secretary's business filing fees, applications fees for retail marijuana licenses are valid regulatory fees that may be periodically adjusted to fund a comprehensive regulatory regime.

As previously noted, the more common circumstance in which municipalities traditionally perform functions that are *entirely* sustained by fee revenue is when the municipality is operating in a proprietary capacity and assessing user fees and service charges to customers in much the same way a "business" would do so. See, e.g., *City of Northglenn v. City of Thornton*, 569 P.2d 319 (Colo. 1977). Laws establishing municipal utilities have traditionally imposed parameters on fee setting, with the intent of promoting full cost recovery through the utility's fees and service charges. A good example is provided by Denver's charter provisions establishing the Denver Water Department. §§ 10.1.9 through 10.1.14, Denver Charter. ("The Board shall fix rates for which water shall be furnished for all purposes within the City and County of Denver, and rates shall be as low as good service will permit. Rates may be sufficient to pay for operation, maintenance, reserves, debt service, additions, extensions, betterments, including those reasonably required for the anticipated growth of the Denver metropolitan area, and to provide for Denver's general welfare." Charter § 10.1.9)

In analyzing whether the provisions of C.R.S. § 24-21-104(3)(b) requiring the Secretary to periodically adjust his fees to fully support the expenses of his office should be allowed to stand, the court should be mindful that municipalities throughout Colorado routinely adjust their fees by operation of law, or as necessary to cover operating expenses, without concern that such adjustments may trigger a voter approval requirement under TABOR.

D. TABOR does not support a challenge to either a fee or a tax adjustment which occurs pursuant to a law adopted prior to the adoption of TABOR.

Denver and CML strongly support the Secretary in his principal argument that he should be able to continue to adjust his fees under the requirements of C.R.S. § 24-21-104(3)(b) without the need for voter approval because the statute pre-dates TABOR, based primarily upon the reasoning set forth in *Huber v. Colorado Mining Association,* 264 P.3d 884 (Colo. 2011). We acknowledge that if the court rules for the Secretary on this theory, the decision may not involve a reexamination of the law distinguishing fees from taxes, or distinguishing regulatory fees from user fees as discussed in this brief.

On general principle, municipalities support any ruling by the appellate courts to the effect that TABOR did not disrupt or counteract any laws or any lawful fiscal policies or practices that were in place prior to the adoption of TABOR, except to

the extent explicitly required by the language of TABOR itself. Thus, municipalities applauded the reasoning by this court in the *Colorado Mining Association* case. For the same reason, we embraced the holding in *Bolt v. Arapahoe County School District Number Six*, 898 P.2d 525, 536-537 (Colo. 1995), in which the court reasoned that local governments are allowed to adjust their mill levies annually to make up for revenue lost due to abatement and refund of taxes in the prior year, just as they had been required or permitted to do so under a pre-TABOR state statute, C.R.S. § 39-10-114(1)(a)(I)(B). Local governments have also been on the winning side when arguing that TABOR does not require voter approval for changes to existing taxes when the taxes were already authorized at an election that occurred prior to 1992. *Bruce v. Pike Peak Library District*, 155 P.3d 630 (Colo. App. 2007); *TABOR Foundation v. Regional Transportation District*, 417 P.3d 850 (Colo. App. 2016), affirmed on other grounds by *TABOR Foundation v. Regional Transportation District*, 416 P.3d 101 (Colo. 2018). The courts have been consistently willing to look back prior to the adoption of TABOR and affirm the continuing validity of laws adopted or actions taken prior to 1992 when such laws or actions are not expressly superseded by TABOR, and this court should do the same in the instant case.

CONCLUSION

For the foregoing reasons, Denver and CML respectfully request that the court allow the Secretary to continue to collect and adjust the regulatory fees that support the functions of his office under C.R.S. § 24-21-104(3)(b), based on the reasoning set forth in *Huber v. Colorado Mining Association*. If the court eschews this approach and renders judgment on whether the regulatory fees charged by the Secretary are in fact "taxes," we urge the court to apply the analytical approach to evaluating regulatory fees (as distinguished from "user fees") set forth in this brief and conclude that the secretary's fees are not taxes because they are expressly calibrated to cover only the direct and indirect costs of running the Secretary's office and not the general expenses of state government.

Respectfully submitted this 4th day of September, 2018

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CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2018, the foregoing document was filed with the court via Colorado Courts E-Filing. True and accurate copies of the same were served on the following via Colorado Courts E-Filing:

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