UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M.A.K. INVESTMENT GROUP, LLC, a Colorado limited liability company, Appellant v. CITY OF GLENDALE, a political subdivision of the State of Colorado, and GLENDALE URBAN RENEWAL AUTHORITY, a Colorado urban renewal authority, Appellees.	Case No. 16-1492

On Appeal from the United States District Court for the District of Colorado,
The Honorable R. Brooke Jackson, District Judge, District Court No. 15-CV-02353

BRIEF OF COLORADO MUNICIPAL LEAGUE, SPECIAL DISTRICT ASSOCIATION, AND DOWNTOWN COLORADO, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR *EN BANC* DETERMINATION, OR, IN THE ALTERATIVE, FOR PANEL REHEARING

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae the Colorado Municipal League ("CML"), Special District Association of Colorado ("SDA") and Downtown Colorado, Inc. ("DCI"), through counsel, Brownstein Hyatt Farber Schreck, LLP, and in compliance with Federal Rule of Appellate Procedure 26.1 regarding corporate disclosure, state as follows:

CML does not have a parent corporation and no publicly held entity owns ten percent or more of its stock.

SDA does not have a parent corporation and no publicly held entity owns ten percent or more of its stock.

DCI does not have a parent corporation and no publicly held entity owns ten percent or more of its stock.

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INTRODUCTION

Pursuant to Fed. R. App. P. 29(b), the Colorado Municipal League ("CML"), Special District Association ("SDA") and Downtown Colorado, Inc. ("DCI") respectfully submit this brief as *amici curiae* in support of Appellees' Petition for *En Banc* Determination, or, in the Alternative, for Panel Rehearing ("Petition").

CML, SDA and DCI join in the arguments raised in the *amicus* brief of the Colorado Municipal Bond Dealers Association filed concurrently herewith—Brief of Colorado Municipal Bond Dealers Association as *Amicus Curiae* in Support of Appellees' Petition for En Banc Determination, or, in the Alternative, for Panel Rehearing ("CMBDA Amicus Brief"). They file separately because the issues of concern to their specific organizations and membership are related to but distinct from the concerns of CMBDA.

As explained in greater detail in the CMBDA Amicus Brief, the panel's decision as written would cause far-ranging disruption of Colorado's statutory scheme for improving "slums" and other underprivileged areas. In particular, the language of the panel's opinion could significantly restrict municipalities' ability to issue municipal bonds to finance ongoing urban renewal undertakings and activities. This disruption will occur even as to urban renewal plans that do not

involve any potential exercise of eminent domain.

Such interference with the Colorado Legislature's chosen approach to urban renewal is unwarranted and unnecessary. The panel's due process analysis treats the blight determination at issue as if it were specifically targeted at the property owner in question. In fact, blight determinations are findings of general application to entire geographic areas, like zoning ordinances or property tax regulations. Due process does not require individualized notice to each property owner subject to such general findings. Even if it did, the panel's due process concerns would not be triggered in circumstances where there is no possibility the municipality will make use of the blight determination in question to exercise its power of eminent domain.

INTEREST OF AMICI CURIAE COLORADO MUNICIPAL LEAGUE, SPECIAL DISTRICT ASSOCIATION, AND DOWNTOWN COLORADO INC.

CML is a statewide non-profit membership association of 270 cities and towns. These encompass the 57 urban renewal authorities affected by the panel's decision in this action. Moreover, all 270 cities and towns will be affected to the extent the panel's decision establishes precedent as to the due process implications of zoning ordinances and other legislative determinations.

Established in 1975, SDA is a Colorado non-profit corporation comprised of

over 1800 special districts located throughout the State of Colorado. The SDA facilitates communication among its member special districts, as well as research, legislative input, administrative support, and training opportunities for those districts. These special districts are independent governmental entities, many of which interact with the urban renewal authorities directly impacted by the panel's decision. In many cases, special districts issue the bonds financing urban renewal undertakings and activities, in return for pledge of revenues by the relevant urban renewal authorities. These cooperative financing arrangements are also jeopardized by the panel's holding.

DCI is a non-profit membership association committed to building better communities by providing assistance to Colorado downtowns, commercial districts and town centers. DCI is comprised of more than 150 members, which include urban renewal authorities, downtown development authorities and business improvement districts. As such, DCI and its membership have a direct interest in urban renewal in the State of Colorado.[1]

All of these amici have varying, but in each instance significant, interests implicated by the panel's decision. The panel's decision may have a broad impact

[1] In the interests of full disclosure, it is noted that counsel for amici Carolynne C. White is

on a host of urban renewal projects far beyond the scope of the interests of the named parties to this case. CML, SDA and DCI write to alert the Court to the potential unintended consequences of the panel's decision as written, and to request that the Court undertake *en banc* review of this matter or, in the alternative, that the panel grant rehearing to alter or amend its opinion in light of the concerns raised herein.

CMBDA's counsel authored portions of this brief.

ARGUMENT

As argued in greater detail in the CMBDA Amicus Brief, the panel's decision creates a far-reaching impediment to urban renewal authorities and other local governments seeking to undertake urban renewal projects expressly authorized by C.R.S. §§ 31-25-101 to -116. The panel's new rule of law creating that impediment is unwarranted, relying on a legal presumption that does not exist in the law, and also unnecessary, because the panel could have reached the same outcome applying far more narrow reasoning.

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a member of the board of DCI.

I. THE PANEL'S DECISION DRAMATICALLY DISRUPTS MUNICIPAL FINANCING OF URBAN RENEWAL PROJECTS IN COLORADO.

"Urban blight is a matter of both statewide and local concern." *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1385 (Colo. 1980). Accordingly, the Legislature enacted the Urban Renewal Law to enable municipalities to address "slum and blighted areas which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state in general and of the municipalities thereof." C.R.S. § 31-25-102(1). Yet contemplated and active municipal bond financings throughout the state are currently on hold or in jeopardy, because urban renewal authorities, other governmental agencies, and their bond counsel are uncertain whether they can certify compliance with the terms of the Urban Renewal Law in light of the panel's decision in this case, even in circumstances where the underlying urban renewal plans do not involve any potential exercise of eminent domain.

Local governments, including members of CML, SDA, and DCI, are directly impacted by the panel decision's disruption of municipal financing in connection with urban renewal authorities; moreover, their ability to continue to execute their fundamental legislative functions without creating a host of new due process notice

obligations is now uncertain.

II. THE LANGUAGE OF THE PANEL'S OPINION DISRUPTING BOND FINANCING OF URBAN RENEWAL PROJECTS IS UNWARRANTED AND UNNECESSARY.

As set forth in the CMBDA Amicus Brief, the panel's decision—and its resulting impact on municipal financing in Colorado—is not required by Constitutional jurisprudence for two independent reasons. First, the panel's decision proceeds from a new legal principle unsupported by existing case law: that a legislative determination of general applicability triggers notice requirements as to specific affected individuals in order to comply with due process. Second, regardless of the merits of the panel's due process analysis, the scope of the panel's opinion is unnecessary—at a minimum, the opinion should be clarified to limit its application to blight determinations that carry the possibility of exercise of a municipality's power of eminent domain.

The panel's novel approach is unwarranted because, while the panel relied on decisions in which a cause of action is itself a protectable property interest, none of these decisions involved legislative rulings of general application. The blight designation at issue here was part of a comprehensive urban renewal plan applying community-wide development goals to an entire area. *See* Aplt. App. at 26-33.

This is a legislative action, as the Colorado Legislature has made perfectly clear. *See* C.R.S. § 31-25-105.5 (2)(c) ("any determination made by the governing body pursuant to paragraph (a) of this subsection (2) shall be deemed a legislative determination"). As Appellees demonstrate in their Petition, legislative determinations do not give rise to property rights for due process purposes. *See Onyx Props. LLC v. Bd. of Cty. Comm'rs of Elbert Cty.*, 838 F.3d 1039, 1044-46 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1815 (2017).

As the Supreme Court has long since explained, due process does not require individualized notice with respect to legislative determinations that apply generally:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (rejecting challenge to determination by Colorado State Board of Equalization and Colorado Tax Commission to increase tax rates applicable to Petitioner). For this Court to hold otherwise would have far-reaching implications upon any and all

legislative determinations made by CML's membership into the future. There is no basis in logic or in the applicable case law to so dramatically rework the due process framework for local governments' legislative actions.

In any event, even if the panel were correct that the legislative blight determination at issue gave rise to an individualized notice requirement as a matter of due process, the panel's opinion unnecessarily appears to extend far beyond that holding. The panel's opinion arguably suggests that any blight determination triggers such notice requirements. But the panel's reasoning only applies to determinations that might lead to a subsequent eminent domain proceeding. At a minimum, the opinion should be clarified to limit its application to circumstances where an eminent domain proceeding might result from the disputed blight determination.

The panel reasoned that a property owner could not be deprived of the state-given cause of action to challenge blight determinations, regardless of whether such a deprivation had a meaningful impact on the value of the subject property. 2018 WL 2188900, at *5. Crucially, however, this cause of action to challenge a blight determination is found in C.R.S. § 31-25-105.5(2)(b), which applies only to blight determinations in the context of "a proposed transfer of private property acquired

by an authority by eminent domain." C.R.S. § 31-25-105.5(2)(a). This is consistent with the panel's repeatedly expressed concern that the blight determination at issue might subject M.A.K. Investment Group to subsequent condemnation proceedings.

But there are many circumstances where an urban renewal plan would *not* implicate potential eminent domain proceedings. Such circumstances include: (i) plans that do not authorize use of eminent domain; (ii) plans that authorized eminent domain, but more than seven years have passed since the initial blight determination, so that eminent domain is no longer available under the Urban Renewal Law, *see* C.R.S. § 31-25-105.5(2)(a)(I); (iii) plans where certificates of completion have already been issued, such that condemnation is no longer available, *see*, *e.g.*, *Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, Inc.*, 85 P.3d 1066 (2004) (authority did not retain power to condemn property that had already been sold and developed in accordance with urban renewal plan); and (iv) specific undertakings within a plan which may authorize eminent domain, but which undertakings do not involve any potential use of eminent domain. The panel's decision as written creates confusion as to bond financings involving nearly any urban renewal plan, regardless of whether they carry any possibility of eminent

domain proceedings. Because neither the reasoning nor the statutory basis for the panel's decision applies to blight determinations that cannot result in a condemnation of property, CMBDA at a minimum requests a clarification of the panel's opinion to distinguish such circumstances, so that the options for municipal financing in such situations are not affected by the outcome of the case at bar.

Respectfully submitted this 5th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing amicus brief complies with Fed. R. App. P. 29(b)(4) as follows:

- This brief contains **1,868** words, which is not more than the 2,600 words permitted for an amicus brief in support of a petition for *en banc* determination or for rehearing; and
- This brief has been prepared in Times New Roman 14-point font, double-spaced.

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