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<tr><td>COLORADO SUPREME COURT<br>Colorado State Judicial Building<br>Two East 14th Avenue<br>Denver, CO 80203</td><td rowspan="4">▲COURT USE ONLY ▲<br><br>Case No: 2017SC000735</td></tr>
<tr><td>COURT OF APPEALS, STATE OF COLORADO<br>Hon. Judge Jones; Graham and Welling, JJ., concur<br>Appeals Court Case No. 16CA1355<br><br>Jefferson County District Court No. 2015CV031189<br>Honorable Christopher Clayton Zenisek, Judge</td></tr>
<tr><td>Petitioners: CITY OF GOLDEN, COLORADO; and JEFF HANSEN, in his official capacity as Finance Director of the City of Golden, Colorado<br><br>v.<br><br>Respondent: SODEXO AMERICA, LLC.</td></tr>
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<tr><td colspan="2">BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE<br>IN SUPPORT OF PETITIONER, CITY OF GOLDEN</td></tr>
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 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 3,977 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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The Colorado Municipal League ("CML" or the "League") by undersigned counsel and pursuant to C.A.R. 29, submits this brief as *amicus curiae* in support of Petitioner, City of Golden ("Golden" or "the City").

## INTEREST OF AMICUS CURIAE

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. As the outcome of this case will impact all cities and towns in Colorado, CML's participation provides the Court with a statewide municipal perspective on the issues.

Local governments are greatly concerned with the court of appeals' decision in this case because it undermines the legal fabric of retail sales. Under the appellate decision, a retailer may contractually circumvent its obligation to collect and remit sales tax by creating a pretextual intermediary between itself and the end consumer. This interpretation weakens the voluntary tax compliance system relied upon by Colorado municipalities. Further, the contract practices discussed in this case will be adopted and adapted to the developing retail environment. A

multitude of new payment options have emerged in only the last decade. This constant evolution of economic markets continues to expand the potential impact of the appellate court's decision. Policy makers strive to draft tax laws in ways that are as generally applicable as possible. If creative contracting or payment options supersede the objective substance of a retail sale, any retailer may avoid its obligation to collect and remit sales tax by entering into an agreement with a tax-exempt entity.

## STATEMENT OF THE CASE AND ISSUES PRESENTED

The City effectively presented the factual background of the case, incorporated here by reference, and the Court granted certiorari review of the following issue:

1. Whether the court of appeals erred in determining that Sodexo sells food to the Colorado School of Mines at wholesale, such that the subject transactions are exempt from taxation under the Golden Municipal Code.

## ARGUMENT

The City makes several distinct arguments in support of its appeal and CML will not reiterate every aspect of the City's Opening Brief. Rather, CML wishes to emphasize the prevailing and substantial influence of the Court's decision over Colorado municipalities, beyond the specific facts of this case.

The Court must decide here whether a contract between a retailer and a tax-exempt entity magically transforms a retail sale into a tax-exempt wholesale. Tax planning strategists may wish for this kind of alchemy; however, Colorado case law proscribes its application because a retailer cannot contract away its statutory requirement to collect and remit sales tax. Thus, the question for the Court becomes whether an exemption applies that excuses Sodexo from this obligation. The burden of proof on a tax exemption claim rests with the taxpayer, in this case Sodexo, and Sodexo has failed to show beyond a reasonable doubt that it qualifies as an exempt wholesaler.

## A. Courts Must Use Plain Meaning, Resolve Doubts in Favor of Taxing Authority, and Avoid Absurd Results in Statutory Construction.

In establishing local policy or laws, municipalities rely on predictable and consistent court action. Ordinances must be interpreted and applied based on their plain language to give effect to the drafter's intent. See *Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 995 (Colo. 2003) (noting that "a tax statute is no different than any other statute"); *Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1141 (Colo. App. 2010) (construing municipal ordinance or code using the same rules used when interpreting statutes) (citing *Waste Mgmt. of Colo., Inc. v. City of Commerce City*, 250 P.3d 722, 725 (Colo. App. 2010). These communities expect courts to construe ordinances as a whole "to give consistent,

harmonious, and sensible effect to all of its parts." *Cendant Corp. & Subsidiaries v. Dept. of Revenue*, 226 P.3d 1102, 1106 (Colo. App. 2009) (citing *Jefferson County Bd. of County Comm'rs v. S.T. Spano Greenhouses, Inc*., 155 P.3d 422, 424 (Colo. App. 2006)). Further, municipalities depend on the assurance that courts will not construe ordinances to defeat the legislative intent or to render the laws meaningless or absurd. See *People v. Berry*, 292 P.3d 954, 957 (Colo. App. 2011); *Stevinson Imps., Inc. v. City & County of Denver*, 143 P.3d 1099, 1103 (Colo. App. 2006).

While the City addresses this issue in detail in its Opening Brief, and these arguments will not be repeated in length here, the League must reiterate that the court of appeals' statutory construction defeats the intent of otherwise clear and unambiguous ordinances. Specifically, the broad language of the City's sales tax ordinance clearly imposes a sales tax on all sales of food, prepared food, and food for immediate consumption. GOLDEN, CO. MUN. CODE § 3.03.030(a)(4). See *AT&T Commc'n of the Mountain States, Inc. v. Charnes*, 778 P.2d 677, 681 (Colo. 1989) (affirming the "longstanding principle of statutory construction which provides that a statute written in general terms applies to subjects or activities which come into existence after adoption of the statute"). Yet, the court of appeals relies on the contractual relationships between Sodexo and the Colorado School of

Mines ("CSM") to reach the conclusion that Sodexo is not a retailer for meal services sales, but rather in that capacity, stands as a wholesaler to CSM. *Sodexo Am., LLC v. City of Golden*, 2017 COA 118 ¶ 27.

The taxable event for the City's retail sales tax is the acquisition of food by the consumer. GMC §§ 3.02.010 3.03.030(a)(4). Acquisition is indistinguishable whether a consumer purchases a meal in a bundled meal plan or purchases with cash or credit card: the nature of the taxable event remains the same. *Telluride Resort & Spa, L.P. v. Colo. Dept. of Revenue*, 40 P.3d 1260, 1266 (Colo. 2002) (discussing the stream of commerce for a retail sale). The court of appeals noted that Sodexo was a retailer for credit card and cash sales. *Sodexo*, 2017 COA at ¶10, n 3. However, by concluding that Sodexo acts as a wholesaler for meal plan sales, the court of appeals missed the plain, simple, and practical reality: Sodexo engages all consumers, regardless of how payment is tendered, as a seller in a retail transaction because the acquisition of the meal is the trigger to the City's statutory incidence of sales tax. As it stands, the appellate decision creates the legal fiction that a contract can transmute a retailer into a wholesaler. Nothing in sections 3.02.010 or 3.03.030(a)(4) of the Golden Municipal Code suggests the City contemplated or intended such an absurd result—a construct that undermines any notion of consistent or reasonable application of these ordinances. *People v.*

*Cross*, 127 P.3d 71, 74 (Colo. 2006) (avoid interpretations that produce illogical or absurd results).

Cities and towns adopt tax ordinances and policies, as Golden did in this case, to reflect the cannons of statutory construction articulated by Colorado precedent. Statutory interpretation assures municipal governments that a creative interpretation will not undermine the legislative process, which may also require voter approval under the Taxpayer Bill of Rights for new or expanded taxes. An unpredictable judicial interpretation exceeds a court's scope of authority and interferes with the resources and public debate necessary to enact a tax ordinance. New and unintended interpretations disrupt legislative intent, destabilize the legislative process, and shake the confidence legislators have in their ability to implement a desired policy change.

### B. Sodexo Holds the Burden of Proof on a Tax Exemption Claim.

In *Sodexo*, there is no dispute that a taxable event occurs; rather, this Court must determine which entity stands as the retailer, and whether an exception applies along the chain of transactions. On review of a summary judgment motion, the burden of proof squarely rested with Sodexo to prove beyond a reasonable doubt that it is a tax-exempt wholesaler, a show of proof that it failed to meet. The court of appeals erred when it based its decision on a *de novo* review on its

conclusion that the City failed to meet its burden of proof, rather than Sodexo. *Sodexo*, 2017 COA at ¶ 12 (citing *Hamon Contractors, Inc. v. Carter & Burgess, Inc*., 229 P.3d 282, 290 (Colo. App. 2009)).

Colorado case law requires courts to construe doubts in tax provisions against the government and in favor of the taxpayer, however, courts must *narrowly interpret tax exemptions in favor of the taxing authority*. See *Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1141 (Colo. App. 2010) ("We presume that taxation is the rule, and it is the taxpayer's burden to prove it is entitled to an exemption."); *International Paper Co. v. Cohen*, 126 P.3d 222, 224 (Colo. App. 2005) (citing *Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue*, 40 P.3d 1260 (Colo. 2002)). In *Sodexo*, the City failed to persuade the court of appeals and, the court instead resolved the statutory interpretation "to ensure that a taxpayer isn't subjected to a tax that, under the correct interpretation, it has no legal obligation to pay." *Sodexo*, 2017 COA at ¶ 35. The conclusion erred in its misapplication of the general rules of interpretation and burden of proof for a tax exemption claim.

The cannons of construction for tax laws (construing statutes against the taxing authority; construing exemptions narrowly) are not applied sequentially or simultaneously. Instead, it is the posture of the case determines which rule of statutory construction applies and which party bears the burden of proof. If the issue is whether a tax is imposed at all, then the court's review is based on the

general principle that tax provisions are interpreted against the taxing authority. *Leggett*, 251 P.3d at 1141. However, if the taxing authority has assessed a tax on a taxpayer, and the taxpayer claims an exemption from the tax, the court must resolve any reasonable doubt against the tax exemption, which the taxpayer has the burden to overcome. *Id.* Thus, the proper reading of Colorado precedent indicates that:

> However, this presumption [that tax statutes will be construed against the taxing authority] is ***reversed*** when the taxpayer claims a statutory exemption from taxation. "Unless the statutes and the [C]onstitution place the property within a stated category of exemption, we resolve doubts regarding the meaning of statutes and the [C]onstitution in favor of subjecting the property to payment of its fair proportion of taxation." Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue, 40 P.3d 1260, 1264 (Colo.2002). Thus, "we presume that taxation is the rule and exemption from taxation is the exception." *Id.* "The taxpayer has the burden of proving entitlement to the exemption claimed."

*Noble Energy, Inc. v. Colo. Dept. of Revenue*, 232 P.3d 293, 296 (Colo. App. 2010) (emphasis added).

The two principles are disjunctive: either the case presents an issue of taxability (construed against the taxing authority) or a tax exemption (construed narrowly). The court of appeals decision mixes, merges, and co-mingles these principles. This was an error in law. Sodexo failed to meet, or be held to by the appellate court, its burden to overcome the presumption on a tax exemption claim.

## C. A Service Agreement was the Primary Purpose of the Contract

The court of appeals erred by characterizing Sodexo as a mere go-between betwixt students and CSM because this contradicts long-standing Colorado case law. See *Sodexo*, 2017 COA at ¶ 3. The appellate court focuses on minutiae in its analysis, giving the details of the transaction between students and a food service supplier particular emphasis when distinguishing facts in *Prophet* from those before this Court in the Sodexo appeal. *Sodexo*, 2017 COA at ¶¶ 32, 33 (citing *Hodgson v. Prophet Co*., 472 F.2d 196 (10th Cir. 1973)). Following the same logic the City sets forth in its Opening Brief, the League likewise observes no indicia in the service agreement between Sodexo and CSM of a contract between a wholesaler and a retailer.

Courts use the primary purpose test to evaluate a taxpayer's actual purpose in the stream of commerce. The test, however, is not a magical formula that allows vendors to change the true nature from retailer to wholesaler. The primary purpose standard is also not an inquiry as to the taxpayer's subjective intent, but rather it is an inquiry into the taxpayer's <u>actual</u> conduct. In general, retail transactions involve the end-consumer purchasing goods or services from a seller. *A.B. Hirschfeld Press, Inc. v. City and County of Denver*, 806 P.2d 917, 921 (Colo. 1991) ("The standard does require inquiry into the actual conduct of a purchaser

subsequent to a disputed purchase to ascertain by objective means the primary purpose of the transaction.”). Further, other indicative factors include:

> the nature of the purchaser’s contractual obligations, if any, to use, alter or consume the property to produce goods or perform services; the degree to which the items in question are essential to the purchaser’s performance of those obligations; the degree to which the purchaser controls the manner in which the items are used, altered or consumed prior to their transfer to third parties; and the degree to which the form, character or composition of the items when transferred to third parties differs from the form, character or composition of those items at the time they were initially purchased.

*Id*. Under this objective standard set forth in *Hirschfeld*, the agreement between Sodexo and CSM is objectively a service contract where the primary purpose of the parties’ agreement is for Sodexo to plan, order, prepare, serve, and sell meals. *Regional Transp. Dist. v. Martin Marietta Corp.*, 805 P.2d 1102, 1105 (Colo. 1991) (“The use to which the purchaser puts the property will often define the true nature of a particular transaction.”). In *Sodexo*, the agreement between the vendor and the institution is clearly not a wholesale-resale contract.

The fact that Sodexo does not receive consideration simultaneously with a student’s meal service is not relevant to the statutory incidence of the sales tax on food upon acquisition by the consumer. The student and Sodexo exchange consideration through CSM. *Sodexo*, 2017 COA at ¶¶ 21, 22. The recitation of case law provided in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) is

exactly en pointe:[1] identifying tax incidence has evolved away from a transfer analysis. However, that is the sole focus of the court of appeals. See *Sodexo*, 2017 COA at ¶ 25, n 7.

Moving away from a title transfer analysis, the statutory tax incidence is evident: Sodexo serves and sells students, which are end consumers, the tangible personal property (food) at retail. Unlike other food preparation transactions, Sodexo is not acting as a wholesaler by providing produce and bulk foodstuffs that CSM must then alter (food preparation) or serve and sell to the end consumer (student). The court of appeals concludes, in error, that "Mines doesn't alter or use the meals provided to students, and the economic reality of the parties' relationships is that Mines acquires the meals to resell to its students at a higher price. It follows that Sodexo's sales to Mines are wholesale sales under the primary

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[1] "This Court, almost 50 years ago, observed that 'taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed-the actual benefit for which the tax is paid.' In a number of cases, the Court has refused to permit the transfer of formal legal title to shift the incidence of taxation attributable to ownership of property where the transferor continues to retain significant control over the property transferred. In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed. The Court has never regarded 'the simple expedient of drawing up papers,' as controlling for tax purposes when the objective economic realities are to the contrary. 'In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding.'" *Frank Lyon Co. v. United States*, 435 U.S. 561, 572–73 (1978) (citations omitted).

purpose test." *Sodexo*, 2017 COA at ¶29. This is in error because "… a reviewing court must look beneath the surface of the transaction to properly classify the transaction as a wholesale or retail sale. The standard to be applied in such judicial inquiries is whether the primary purpose of the purchase was the acquisition of the item for resale in an unaltered condition and basically unused by the purchaser. If so, the sale was a wholesale transaction." *Conoco, Inc. v. Tinklenberg*, 121 P.3d 893, 896 (Colo. App. 2005) (citing *A.B. Hirschfeld Press, Inc. v. City & County of Denver*, 806 P.2d 917, 921–24 (Colo. 1991)). The facts in the *Conoco* decision are relevant because even a conceivably valid wholesale in bulk may become, over time, a transaction for which an excise tax (use tax) obligation may attach. Here, Sodexo acquires foodstuff, presumably at wholesale, not for resale in an unaltered condition to CSM. Rather, Sodexo greatly alters bulk items, preparing the food, and selling the food at retail. Nothing in the facts presented by Sodexo demonstrates the actual, day-to-day business practices were anything other than a retail operation.

## D. This Case Will Impact Numerous Colorado Cities and Towns

Colorado's municipalities greatly rely on the sales tax. In Colorado, sales and use tax generates 69% of total municipal tax revenues.[2] The potential revenue losses to municipalities in Colorado if many service agreements adapt this contract drafting approach will be significant. Further, Colorado's cities and towns need the ability to consistently apply tax obligations to ensure sufficient compliance so that no business gets a competitive advantage over others by avoiding tax obligations. In this case, Sodexo and retailers who may adopt these contracting practices to define themselves as *per se* wholesalers will gain a competitive advantage over other retailers. It is critical that this Court construe sections 3.02.010, 3.03.030(a)(4), and 3.03.040 of the municipal code with the City's purpose and intent, and reverse the decision of the court of appeals. Colorado's municipalities have a great interest in ensuring that tax exemption claims are properly adjudicated. By failing to identify Sodexo as the party bearing the burden of proof, the court of appeals made a critical error of law. Without the presumption that tax exemptions are construed narrowly, and that the burden of proof of eligibility rests on the taxpayer, more legal challenges will be filed (not

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[2] This data was requested from the Colorado Department of Local Affairs (DOLA), which collects and publishes the revenue and spending plans for local governments. *See* DEPT. OF LOCAL AFFAIRS, *County & Municipal Financial Compendium* (2017), https://www.colorado.gov/pacific/dola/county-municipal-financial-compendium.

only for municipal tax exemption ordinances, but for sales and use tax laws adopted by any governmental authority in Colorado). The court of appeals' decision has introduced an element of chaos – and we urge this Court to provide the clarity and certainty of its long-standing decisions in the area of tax exemptions.

Colorado municipalities need certainty to operate fair and effective tax systems. However, fairness and effectiveness cannot be achieved following the convoluted reasoning of the *Sodexo*, which would allow a retailer to contract away its statutory requirement to collect and remit sales tax. To contract away statutory taxpayer obligations unravels the fabric of the voluntary tax reporting and remitting scheme of the retail sales tax system. Indeed, if the court of appeals decision is affirmed, some retailers will be inspired to adopt contract provisions that define themselves as a wholesaler. Tax incidence by self-appellation is a dangerous precedent, especially in the sales tax context. These are absurd results. The League urges this Court to apply the long-standing principles of statutory interpretation in the area of tax law and to return to the plain meaning of the City's ordinances.

## CONCLUSION

For the reasons set forth here and in the City's Opening Brief, CML urges this Court to reverse the order of the court of appeals, and reinstate the order of the district court, granting summary judgment in favor of the City, or, in the alternative, reverse the order of the court of appeals and remand the matter back to the court of appeals for findings on the remaining issues. Municipalities deserve a clear rule on who to tax in the interest of both fairness and ability to govern effectively.

Respectfully submitted this 16th day of March, 2018.

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