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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from the Arapahoe County District Court Hon. Kurt A. Horton, Judge Case No. 2014CV30822	
Plaintiff/Appellant: AMERICAN MULTI-CINEMA, INC., as successor-in-interest to AMC SHOWPLACE THEATRES, INC., d/b/a ARAPAHOE CROSSING 16. and SOUTHLAND STADIUM 16 v. **Defendant/Appellee:** CITY OF AURORA	▲ **COURT USE ONLY** ▲
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BRIEF OF *AMICI CURIAE*, COLORADO MUNICIPAL LEAGUE, CITY OF FORT COLLINS, CITY OF LITTLETON, CITY OF LONGMONT, CITY OF MONTROSE, AND CITY OF WESTMINSTER, IN SUPPORT OF APPELLEE, CITY OF AURORA

CERTIFICATION

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 2,583 words (does not exceed 4,750 words).

The 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.

s/ Michael J. Axelrad
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Amici Curiae Colorado Municipal League ("CML"), City of Fort Collins, City of Littleton, City of Longmont, City of Montrose, and City of Westminster respectfully submit the following *Amicus* Brief in Support of Appellee, City of Aurora.

INTRODUCTION

CML, formed in 1923, 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. Its members include all 101 home rule municipalities, 169 of the 171 statutory municipalities and the lone territorial charter city. This membership includes all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

The cities of Fort Collins, Littleton, Longmont, Montrose, and Westminster are home rule cities in the State of Colorado, organized under Colorado Constitution Article XX § 6. Each municipality collects or has collected use taxes on the digital projection of motion pictures within its jurisdiction. The outcome of this case will have direct impact

on the ability of each municipality to collect and remit use taxes. Additionally, the cities of Fort Collins, Longmont, and Westminster face lawsuits on the same tax issue. The cases against Longmont and Westminster are stayed pending the outcome of the present case. AMC's lawsuit against Fort Collins has been dismissed without prejudice with the applicable statute of limitations tolled by agreement of the parties pending the outcome of this case.

Sales and use taxes are the principal means by which municipalities are able to fund the police, fire, public works, and all other municipal operations and services. "A hallmark of taxes is 'that they are intended to raise revenue to defray the general expenses of the taxing entity.'" *Colorado Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 20 (*quoting Zelinger v. City & Cty. of Denver*, 724 P.2d 1356, 1358 (Colo. 1986)).

Municipalities' ability to impose and collect use taxes has been consistently upheld by the Colorado courts. Appellant ("AMC"), seeking to invalidate use tax on digital projection of motion pictures, is asking this Court to undermine this essential taxation scheme. *Amici* file this

amicus brief to urge the Court to reject AMC's appeal, and uphold the decision of the district court in favor of Appellee City of Aurora.

Despite AMC's attempt to characterize this as an issue that only affects three municipalities, Opening Brief, p. 7 ("only three Colorado home rule cities assert a tax on license fees paid to a distributor under the digital film model, and only the Cities of Aurora and Westminster seek to impose both an admissions tax and a tax on license fees"), in reality it is an issue that has wide impact. A number of municipalities in addition to Aurora and Westminster –including Longmont[1], Fort Collins[2], Golden[3], Montrose[4], and Sheridan[5] –impose a use tax on digital projection of motion pictures. Moreover, even if a municipality does not currently impose such a tax, it remains within their powers, granted by Article XX of the Colorado Constitution, and §§ 29-2-101, *et seq*., C.R.S.

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[1] Longmont Code of Ordinances 4.04.330.

[2] Fort Collins Code of Ordinances Sec. 25-74.

[3] Golden Code of Ordinances 3.03.030(b).

[4] Montrose Municipal Code 5-15-21.

[5] Sheridan Code of Ordinances Sec. 62-169.

Therefore, a determination by the Court on the taxability of this manner of projecting motion pictures – and, by extension, other digital data – would have a significant impact on Colorado municipalities' ability to collect taxes to fund their operations and services.

ARGUMENT

A. Municipalities' Power to Impose Use Tax Is Not in Dispute.

Although AMC concedes that digital motion picture files are tangible property, and thus subject to taxation, it nonetheless seeks to undermine municipalities' ability to enact use tax on this discrete class of property. This is an unwarranted intrusion into the express taxing powers granted to municipalities.

In 1967, the General Assembly delegated to Colorado counties and municipalities the right to levy and collect sales and use taxes on all tangible personal property and certain services. Colo. Sess. L. 1967, p. 660, *et seq*., codified with amendments at §§ 29-2-101, *et seq*., C.R.S. Beyond this statutory grant of authority, Article XX of the Colorado Constitution grants home rule municipalities the broadest authority to

levy sales and use taxes upon goods and services sold, used, or consumed within the municipality.

The power to impose sales and use taxes relates solely to matters of local and municipal concern. *Berman v. City and County of Denver*, 400 P.2d 434, 437 (1965); *Security Life & Accident Co. v. Temple*, 492 P.2d 63, 64 (1972). Thus, when the General Assembly delegated to Colorado's local governments a similar taxing power, it carefully noted:

> Nothing in this article shall be construed to apply to, affect, or limit the powers of home-rule municipalities organized under Article XX of the state constitution to impose, administer, or enforce any local sales or use tax, except those provisions which specifically refer to "home-rule."

§ 29-2-107(1), C.R.S.; *see generally Town of Avon v. Weststar Bank*, 151 P.3d 631, 633-34 (Colo. App. 2006). Indeed, a home rule municipality's authority to levy sales and use taxes is as broad as the authority granted to the General Assembly:

> In numerous opinions handed down by this court extended over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power* theretofore possessed by the legislature to

> authorize municipalities to function in local and municipal affairs.

Four–County Metro. Capital Improvement Dist. v. Bd. of Cnty. Comm'rs, 369 P.2d 67, 72 (1962) (emphasis in original).

"[A] home rule city is not inferior to the General Assembly concerning its local and municipal affairs. The Colorado Constitution confers upon a home rule city a legally protected interest in its local concerns." *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1380–81 (Colo. 1980). "[C]ity budgeting and the assessment and collection of taxes for municipal purposes . . . are local and municipal matters." *City of Colorado Springs v. State*, 626 P.2d 1122, 1127 (Colo. 1980). "[T]he fiscal integrity of a home rule city is a legally protected interest of the city." *City of Northglenn v. Bd. of Cty. Comm'rs*, 2016 COA 181, ¶ 15 (cities had standing to challenge enactment of county "special sales tax," as this created a nonspeculative risk that the cities' tax collection would be impaired).

Accordingly, "[t]he state, even when acting under its regulatory powers, cannot prohibit home rule cities from exercising a power

essential to their existence (local taxation)." *Sec. Life & Acc. Co. v. Temple*, 492 P.2d at 64. This Court should reject this attempt to invalidate a municipality's lawful determination as to which transactions are subject to its sales or use tax.

Courts favor an ordinary and practical construction of an ordinance. 6 McQuillin Mun. Corp. § 20:51 (3d ed.). Therefore, "the practical construction of municipal ordinances by the local authorities who are charged with the duty of applying their provisions and enforcing them prior to the controversy 'is very persuasive.'" *Id.* (*quoting Skeen v. Lynch*, 48 F.2d 1044, 1047 (10th Cir. 1931)). Indeed, "the weight to be given to the construction of legislation by administrative officers who are charged with its application, where its provisions are at all in doubt or uncertain . . . is said to be in the highest degree persuasive if not controlling." *Skeen*, 48 F.2d at 1047. Furthermore, in tax code interpretations, the Colorado Supreme Court requires deference to the municipality's longstanding interpretation of its own tax code. *Gen. Motors Corp. v. City & Cnty. of Denver,* 990 P.2d 59, 74 & n. 15 (Colo. 1999).

B. Municipalities Have the Autonomous Right to Determine Which Events Are Subject to Use Tax. *Amici* Support the City of Aurora's Argument that the *Cinemark* Decision Is Applicable to Digital Projection of Motion Pictures.

In its appeal, AMC argues that, under the considerations enumerated in *City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361 (Colo. 2003), "the true object of AMC's distributor licensing transactions is to obtain an intangible, non-taxable license to exhibit copyrighted intellectual and artistic content." Opening Brief, p. 19.

AMC concedes that divisions of this Court have reached the opposite conclusion, in *Cinemark USA, Inc. v. Seest*, 190 P.3d 793 (Colo. App. 2008) and *Am. Multi-Cinema, Inc. v. City of Westminster*, 910 P.2d 64 (Colo. App. 1995), but argues that the use of new technology – digital projection– should eliminate a municipality's ability to impose use taxes on the presentation of movies in its theatres. Opening Brief, p. 19.

Prior to the advent of digital projection, there was no question that the "experience" of viewing a motion picture consisted of a number of taxable transactions. The admission ticket was subject to taxation, as were the concessions sold to patrons. But it was also well established

that the exhibition of the motion picture is a separate transaction event, subject to its own taxation:

> The use tax is levied upon plaintiff for the privilege of using the film by exhibiting it. The admissions fee is levied upon its customers for the privilege of viewing the screen where the moving images are projected. Hence, not only is each tax levied upon different persons, but it is levied upon the exercise of different privileges arising out of separate transactions. There is, therefore, no double taxation.

Am. Multi-Cinema, Inc., 910 P.2d at 67; *see also Cinemark*, 190 P.3d at 799 ("the essence of Cinemark's transactions is its use of motion picture film reels, tangible final products, for exhibition in its movie theater").

Here, the district court thoroughly analyzed the law and evidence, to identify a legitimate legal basis for continuing to assess use tax on the digital projection of motion pictures. Based upon this analysis, the court concluded that, despite the change in technology, *Cinemark* still governs, and these transactions are still subject to Aurora's use tax. CF, p. 1402. First, the court concluded the contracts for projection of the motion pictures required that they be used in precisely the form that they were distributed. *Id.* Additionally, it concluded that the

transactions were structured for the use of the finished, tangible product. *Id*. Third, the court rejected AMC's argument that the transaction was a purchase of artistic expression:

> [U]nlike *Leanin' Tree,* where the purchase the property [*sic*] not only contained artistic ideas and expression, but also provided the purchaser with the option to use these ideas in a different form then conveyed, AMC was buying an option to use an idea of the movie distributors, and the ideas and the artistic expression for the movie had already been used, edited, and published by the time it reached AMC's theater in the form of a digital movie file.

Id.

The district court's conclusions are consistent with established law, affirming that municipalities have the power to determine those transactions that will be subject to a use tax. Despite AMC's argument, the district court properly found that, even with the use of new, digital technology, this did not alter the substance of the transaction: "the totality of the circumstances show that the essence of the AMC transactions is its use of digital cinema files, tangible final products for

use in its movie theatre." CF, p. 1402. [6]

AMC chose not to challenge the district court's determination that the data files were tangible personal property under Aurora's municipal code. Opening Brief, at 1. The district court's conclusions, being well-supported in the law, should be upheld and serve as a template to affirm the rights of all municipalities – not just Aurora – to tax the distribution and utilization of digital files.

The issues in this appeal affects more than just motion picture projection. In practically all other areas of life, businesses, government agencies, and individuals are enjoying the advantages afforded by digital transactions. From realty listings to on-line transfer of medical data, to streaming entertainment services, digital media have supplanted older media formats. Modern society is constantly evolving, and incorporating digital data in more and more transactions. However, as found by the district court, a mere change in technology does not, by itself, change the true object of the transaction or render it untaxable.

[6] Ironically, AMC's argument is also contrary to the *Leanin' Tree* decision itself, where the Supreme Court reasoned that "[a]ccepted normative principles requiring functionally equivalent transactions to be taxed similarly." 72 P.3d at 365.

Amici support the arguments made by the City of Aurora. Assessing a use tax on the digital projection of motion pictures is a legitimate exercise of the powers granted to municipalities, either as home rule cities under Article XX of the Colorado constitution, or under the provisions of §§ 29-2-101, *et seq*., C.R.S., to generate the tax revenue necessary to fund its municipal operations, including fire, police, and other protections of public safety and health.

C. Treating Movie Projections as "Wholesale Transactions" Is Not Supported by Colorado Law. Approval of This Theory Would Affect Municipalities' Ability to Generate Tax Revenues that Support Basic Municipal Functions.

AMC's final argument, that the projection of a motion picture is a "wholesale transaction" that is not subject to use tax, has already been rejected, as stated by a panel of this Court in the *Westminster* case.

> The customers who pay a fee to watch the running of a motion picture are not given possession of the tangible film, nor do they seek to obtain such possession or any other right thereto. The fee they pay is simply to be able to view images from the film as they are projected onto the screen. Hence, the charge made by plaintiff for the privilege of viewing such images does not constitute a re-sale of the film; it is

> plaintiff, not its customers, who is the ultimate "user" of such tangible personal property.

Am. Multi-Cinema, Inc., 910 P.2d at 67.

There is no basis to characterize movie projection as a wholesale transaction. There is no re-sale of the digital file. That the projection of motion pictures is now accomplished by a digital file – which AMC concedes is tangible personal property – does not alter the taxable nature of the transaction.

Again, the arguments presented in this case may have broader implications on other transactions that involved digital media. Downloading of ebooks or .mp3 files, for example, are distinct, individual transfers. The ability to levy a sales or use tax for on-line purchases of musical streaming service may not be challenged under Colorado's scheme that grants authority to municipalities to assess such taxes. The same principle protects the City of Aurora's imposition of use tax from AMC's challenge.

CONCLUSION

Applications of digital media in various areas of modern life are constantly evolving. Despite this social evolution, municipalities remain

obligated to provide services and operations, and rely on the stability of their tax bases to budget for those services and operations. Any judicial decision that would affect local governments' ability to collect sales and use tax revenue would have significant adverse effect on Colorado's communities. As traditional transactions convert to digital, these conversions do not alter the true object of the transactions or render them untaxable.

A decision in favor of AMC, therefore, will affect not only the taxability of the projection of motion pictures, but an ever-expanding number of transactions in modern e-commerce. The court should not allow this disruption to the well-established right of municipalities to tax these transactions.

Affecting the municipalities' ability to assess use taxes will directly impact their ability to fund the basic services provided to their citizens.

DATED this 8th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2019, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE*, COLORADO MUNICIPAL LEAGUE, CITY OF FORT COLLINS, CITY OF LITTLETON, CITY OF LONGMONT, CITY OF MONTROSE, AND CITY OF WESTMINSTER, IN SUPPORT OF APPELLEE, CITY OF AURORA** was served via Colorado Courts E-Filing to the following:

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