<table>
<tr><td>COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203</td><td rowspan="3">

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<tr><td>Colorado Court of Appeals
Case No. 2017CA1503
Opinion by Furman, J.;
Román and Casebolt, JJ., concurring</td></tr>
<tr><td>Petitioners:
CITY OF WESTMINSTER, COLORADO, a Municipal Corporation; and TAMMY HITCHENS, in her official capacity as Finance Director of the City of Westminster, Colorado,

v.

Respondent:
PARK FOREST CARE CENTER, INC., a Colorado Corporation</td></tr>
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<tr><td colspan="2">BRIEF OF AMICUS CURIAE, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF CITY OF WESTMINSTER'S PETITION FOR CERTIORARI</td></tr>
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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Colorado Appellate Rules ("C.A.R.") 53(g), 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. 53(g).

☑ It contains 1,546 words (does not exceed 3,150 words).

The brief complies with the content and form requirements set forth in C.A.R. 53(g).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 53(g).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES III

IDENTITY OF THE LEAGUE AND ITS INTEREST IN THE CASE 1

REASONS FOR GRANTING CITY OF WESTMINSTER'S PETITION FOR CERTIORARI 2

I. The Court of Appeals' Dismissal of the True Object Test Conflicts with Statewide Reliance by Municipalities. 3

II. The Court of Appeals' Decision Conflicts with Judicial Precedent. 4

III. The Court of Appeals' Decision Conflicts with the Policy of General Assembly to Simplify Tax Statewide. 6

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases

American Multi-Cinema, Inc. v. City of Aurora, 2020 WL 34677 (Colo. App. 2020) 4
Cinemark USA, Inc. v. Seest, 190 P.3d 793 (Colo. App. 2008) 4, 5
City of Boulder v. Leanin' Tree, Inc., 72 P.3d 361 (Colo. 2003) 2, 3, 5
Treece, Alfrey, Musat & Bosworth, PC v. Dep't of Fin., 298 P.3d 993, 998 (Colo. App. 2011) 3, 5
Waste Mgmt. of Colo., Inc. v. City of Commerce City, 250 P.3d 722 (Colo. App. 2010) 5

Municipal Codes

ARVADA, COLO. CODE Sec. 98-61 *et seq.* 4
AURORA, COLO. CODE Sec. 130-1 *et seq.* 4
CENTENNIAL, COLO. CODE Sec. 4-1-10 *et seq.* 4
COLO. SPRINGS, COLO. CODE 2.7.101 *et seq.* 4
DENVER, COLO. CODE Sec. 53-1 *et seq.* 4
FORT COLLINS, COLO. CODE Sec. 25-26 *et seq* 4
LAKEWOOD, COLO. CODE 3.01.010 *et seq.* 4
PUEBLO, COLO. CODE Sec. 14-1-1 *et seq.* 4
THORNTON, COLO. CODE Sec. 26-386 *et seq.* 4
WESTMINSTER, COLO. CODE 4-1-1 *et seq.* 4

General Assembly

H.B. 1216, 69th Gen. Assemb., Reg. Sess. (Colo. 2017) 6
S.B. 006, 71st Gen. Assemb., Reg. Sess. (Colo. 2019) 6
S. J.Rule 038, 67th Gen. Assemb., Reg. Sess. (Colo. 2014) 6, 7

The Colorado Municipal League ("CML" or "the League"), pursuant to C.A.R. 53(g) and 29, respectfully submits this brief in support of Petitioner City of Westminster.

IDENTITY OF THE LEAGUE AND ITS INTEREST IN THE CASE

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 103 home rule municipalities, 166 of the 168 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.

Participation by amicus is intended to provide the Court with a statewide municipal perspective. The League membership consists of municipalities that routinely assesses taxes on businesses in their jurisdictions. The outcome of this case will have an impact on home rule municipalities that self-collect taxes because all collect or have the opportunity to collect use tax that is coextensive with their tax base. In either situation, the Court of Appeals' opinion sweeps away all municipalities' reliance on the true object test when deciding whether a mixed transaction is a service or a product.

The Court of Appeals' decision to overlook the true object test from prior case law will lead to uncertainty among the League membership and confusion on when and if a municipality should adopt any judicial doctrine. Furthermore, discounting the true object test runs contrary to this Court's prior precedent and to the General Assembly's policy for tax simplification.

REASONS FOR GRANTING CITY OF WESTMINSTER'S PETITION FOR CERTIORARI

In less than a page, the Court of Appeals flipped the longstanding understanding of municipalities on when a mixed transaction is a good or a service by stating that "the City does not have a regulation like the one addressed in *Leanin' Tree* . . . [t]hus, we need not characterize Park Forest's sale of meals according to the 'true object' test." *See* District Court Order, page 12 (citing *City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361 (Colo. 2003)). The City of Westminster demonstrated in its petition the error the Court of Appeals made on this point and in the decision as a whole. The League will, in this brief, clarify the statewide impact the decision has and why it runs contrary to longstanding practices in this state.

I. The Court of Appeals' Dismissal of the True Object Test Conflicts with Statewide Reliance by Municipalities.

The collection of sales and use tax in Colorado serves an important purpose: funding of critical government functions, from the municipal level up to the state level. Municipalities, as a part of collecting tax in their jurisdictions, run assessments to determine what and how much tax is owed on a particular transaction.

In the instant case, the City of Westminster ("the City") relied, as it had done many times before, on the test put forth seventeen years ago in *Leanin' Tree*, 72 P.3d at 363, the true object test. The court emphasized the importance of such a test in determining whether a mixed transaction is a good or a service. "Unless the attempt to distinguish tangible from other-than-tangible property is abandoned altogether, some multi-factor or totality of circumstances test, permitting characterization of the transaction according to a reasonable and common understanding of those concepts, is *virtually unavoidable*." *Leanin' Tree*, 72 P.3d at 366 (emphasis added).

The City is not alone in using this test to parse out the difference between a mixed transaction that is predominantly a service (generally not taxable) and a product (generally taxable). *See, e.g., Treece, Alfrey, Musat & Bosworth, PC v. Dep't of Fin.*, 298 P.3d 993, 998 (Colo. App. 2011) ("If the true object is for

tangible personal property, then the use tax applies; but, if the true object is for intangible property or services, then it does not.”).

Municipalities statewide rely on this judicial doctrine to conduct tax assessments, without codifying the test into codes or having city managers “adopt” the test. Upon examination of the ten largest municipalities in Colorado, none have codified the true object test and all rely on the judiciary to apply the judicially created doctrine.[1] The singular paragraph in the Court of Appeals decision slices through precedent that municipalities have been relying on since 2003.

II. The Court of Appeals’ Decision Conflicts with Judicial Precedent.

In addition to municipal reliance on the true object test, courts likewise often turn to the test to determine the taxability of a mixed transaction. *See, e.g., American Multi-Cinema, Inc. v. City of Aurora*, 2020 WL 34677 (Colo. App. 2020) (a decision earlier this year from the Court of Appeals that applied the true object test to determine the taxability of data files bundled with the intangible right to show the motion picture); *Cinemark USA, Inc. v. Seest*, 190 P.3d 793

[1] *See generally*, DENVER, COLO. CODE Sec. 53-1 *et seq.*; COLO. SPRINGS, COLO. CODE 2.7.101 *et seq.*; AURORA, COLO. CODE Sec. 130-1 *et seq.*; FORT COLLINS, COLO. CODE Sec. 25-26 *et seq.*; LAKEWOOD, COLO. CODE 3.01.010 *et seq.*; THORNTON, COLO. CODE Sec. 26-386 *et seq.*; ARVADA, COLO. CODE Sec. 98-61 *et seq.*; WESTMINSTER, COLO. CODE 4-1-1 *et seq.*; PUEBLO, COLO. CODE Sec. 14-1-1 *et seq.*; and CENTENNIAL, COLO. CODE Sec. 4-1-10 *et seq.*

(Colo. App. 2008) (applying the factors in *Leanin' Tree* to determine that a physical product, a film reel, is the taxable event when balanced with the service of displaying the movie); *Treece, Alfrey, Musat & Bosworth, PC v. Dep't of Fin.*, 298 P.3d 993 (Colo. App. 2011) (applying the true object test to determine whether a law firm obtaining copies of medical records from health care providers was a taxable event); and *Waste Mgmt. of Colo., Inc. v. City of Commerce City*, 250 P.3d 722 (Colo. App. 2010) (using the true object test to determine the taxability of roll-off containers bundled with the service of trash removal). The cities, and ultimately the Court of Appeals panels, in each of these cases looked to judicial precedent rather than a city ordinance to determine the taxability of a certain event. In none of these cases did the court look first to see whether the municipality had codified the true object test from *Leanin' Tree* in their local tax ordinance.

The Court of Appeals decision will result in a patchwork of ordinances. The Court of Appeals stated that it would not apply the true object test, contrary to prior decisions of other panels of the Court and of the Supreme Court, because the City does not "have a regulation like the one addressed in *Leanin' Tree* . . . nor [does] any of the other applicable section of the Code refer to a 'true' or 'real object' test." This requirement to have judicial doctrines codified will result in

some cities adopting the test and others, relying on other judicial precedent, continuing to apply the test when assessing mixed transactions. Further, municipalities do not know if this requirement that a judicial doctrine be clarified in ordinance is also required of the many judicial doctrines that municipalities rely upon. Do municipalities need to adopt balancing tests, interpretive guidance, or canons of construction? What occurs when a court modifies these tools, does a municipality also need to do so?

III. The Court of Appeals' Decision Conflicts with the Policy of General Assembly to Simplify Sales Taxes Statewide.

Colorado has a unique and complex taxing system, that includes 72 home rule municipalities who have exercised their constitutional authority to collect tax at the municipal level. The General Assembly enacted several pieces of legislation in the last few years to help simplify the patchwork of rules and ordinances existing in the complex Colorado system—the type of patchwork that the Court of Appeals reintroduces. *See, e.g.,* S. J.Rule 038, 67th Gen. Assemb., Reg. Sess. (Colo. 2014) (requesting municipalities and the state adopt standard definitions to improve the varying definitions in all taxing jurisdictions); H.B. 1216, 69th Gen. Assemb., Reg. Sess. (Colo. 2017) (creating the Sales and Use Tax Simplification Task Force to review the Colorado taxing system); and S.B. 006, 71st Gen. Assemb., Reg. Sess. (Colo. 2019) (authorizing the Department of Revenue and the Office of

Information Technology to procure a single point of remittance software for sales and use tax). The League actively assists in sales tax simplification between the state and the self-collecting home rule jurisdictions dating back to the early 1990s, including assisting in the coordination of creating standard definitions pursuant to S. J.Rule 038.

The Court of Appeals opinion, in one paragraph, cuts into the work that the General Assembly has been actively involved in—simplification in taxation statewide. If all municipalities are required to constantly monitor judicial doctrines on interpretation of tax laws and expressly incorporate these decisions into their local codes, a patchwork of ordinances will arise which will lead to complexity rather than simplicity.

CONCLUSION

For the reasons set forth in this brief, the League respectfully urges this Court to grant the City of Westminster's Petition for Certiorari. Municipalities frequently rely on the true object test in their tax assessments of mixed transactions. The Court of Appeals' opinion has far reaching consequences and conflicts with judicial precedent on tax assessments in Colorado.

DATED this 28th day of May, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2020, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE,* COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF CITY OF WESTMINSTER'S PETITION FOR CERTIORARI** was served via Colorado Courts E-Filing to the following:

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