COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	DATE FILED October 17, 2024 3:30 PM FILING ID: 44162FC02E104 CASE NUMBER: 2024SA178
Appeal pursuant to § 13-4-102(1)(b), C.R.S. District Court, Jefferson County, Colorado The Honorable Chantel E. Contiguglia Case No. 2022CV30412	
Plaintiff – Appellee: METROPCS CALIFORNIA, LLC **v.** **Defendant – Appellant:** CITY OF LAKEWOOD, COLORADO	**▲COURT USE ONLY▲**
Attorneys for Amicus Curiae Colorado Municipal League: Robert D. Sheesley, #47150 Rachel Bender, #46228 1144 Sherman Street Denver, CO 80203-2207 Phone: 303-831-6411 Fax: 303-860-8175 Emails: rsheesley@cml.org; rbender@cml.org	**Case No. 2024SA000178**

BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT – APPELLANT CITY OF LAKEWOOD, COLORADO

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 4,066 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

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/ Robert Sheesley
Robert Sheesley, #47150

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

The Colorado Municipal League ("CML") respectfully submits the following *amicus curiae* brief in support of Defendant – Appellant City of Lakewood, Colorado ("Lakewood").

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 271 of the 273 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 107 home rule municipalities, 163 of the 165 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000. Since its inception, CML has regularly appeared in the courts as an *amicus curiae* to advocate on behalf of the interests of municipalities statewide.

CML's participation as *amicus curiae* provides the Court with a statewide perspective on the negative impact that a ruling against Lakewood will have on municipalities, including the dozens of municipalities that have similar taxes on telecommunications services. Imposing a voter approval requirement pursuant to Article X, Section 20(4) of the Colorado Constitution ("TABOR") for all modifications to existing tax definitions or provisions, including those necessitated by external forces, will harm municipal revenue and services and hinder the simplification, administration, and collection of local taxes. To protect existing

revenue, municipalities must be able to respond reasonably to the evolution of technology, market forces, and federal and state regulations impacting a tax. The costs of TABOR elections will disincentivize the modernization of tax codes, make government unnecessarily expend funds to preserve revenue from outside interference, and create an avoidance to necessary and beneficial updates.

SUMMARY OF THE ARGUMENT

While promising a reasonable restraint of government growth, TABOR does not require the stagnation of a tax system and the government it supports while the world evolves. If a TABOR election is required to make any change to a tax ordinance's definition or terminology, municipalities and other local governments will be unreasonably constrained in responding to external factors that directly or indirectly influence how a tax ordinance uses such definitions or terminology. Local governments will be hindered in improving the collection and administration of taxes or simplifying taxes for the benefit of taxpayers. Local revenues that support critical government functions will be at the mercy of market forces, federal or state interference, or technological developments. CML urges this Court to reject Plaintiff – Appellee MetroPCS of California, LLC's rigid interpretation of TABOR that conceives of an immobilized tax framework and the district court's reliance on decades of hindsight to evaluate the constitutionality of Lakewood's tax ordinances.

ARGUMENT

CML urges this Court to reject an interpretation of TABOR that would stop local governments from modifying existing taxes in response to external influences that change the nature of the thing taxed. Any understanding of what constitutes a "new tax," "tax increase," or "tax policy change" under TABOR should not apply to a modification of an existing tax if the change was brought about by external factors, essentially the same thing is being taxed, and there is no meaningful projected revenue increase resulting from the modification based on information reasonably available at the time of adoption. This reasoning is in line with the Court's framework that "legislation causing only an incidental and de minimis tax revenue increase does not amount to a 'new tax' or 'tax policy change.'" *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101, 102 (Colo. 2018). Municipal government simply cannot function under a rigid regime that fails to defer to the primary legislative purpose of a change and its reasonably projected revenue impact.

I. This Court's pragmatic interpretation of TABOR avoids unreasonable restraints on government.

As pertinent here, TABOR requires advance voter approval for a new tax, tax rate increase, or tax policy change directly causing a net tax revenue gain. COLO. CONST. art. X, § 20(4). TABOR's purpose is to limit new taxes and reasonably restrain the growth of government. *Barber v. Ritter*, 196 P.3d 238, 251 (Colo. 2008).

TABOR's reach is commonly misunderstood to require voter approval for any change to a tax ordinance or definition. This Court, however, has "consistently rejected readings of TABOR that would hinder basic functions or cripple the government's ability to provide services." *Id.* at 248; *see also In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 557 (Colo. 1999) (rejecting an interpretation of Amendment 1 that would "cripple the everyday workings of government"). "Although TABOR restrains government, reasonableness tempers TABOR's grip." *TABOR Found.*, 416 P.3d at 106-07 (internal citations omitted).

In *TABOR Foundation*, this Court confirmed that the adjustment of state tax exemptions that resulted in taxing some things that were not taxed before, for purposes of simplifying the collection and administration of taxes, was not a new tax or tax policy change within TABOR's reach. The Court held that TABOR doesn't govern a tax law change that "doesn't function primarily to raise revenue" because it has only an "incidental and de minimis revenue increase." *Id*. at 106. First, the Court looked to the express and effected purpose of the change, while accepting that there can be a resulting revenue change as "an incidental effect." *Id*. at 106-07. In other words, a revenue change alone did not defeat the stated non-revenue purpose of a change that otherwise accomplished what it was intended to do. Second, the

Court considered, from a practical perspective, the projected revenue effect "as a percentage of the district's overall tax revenue and budget." *Id*. at 107.

A. TABOR does not require voter approval to adjust existing tax ordinances to account for changes in the thing taxed caused by external forces outside of the municipality's control.

Under the district court's rigid interpretation of TABOR, a municipality that imposes a tax using certain definitions or terminology is forever bound to those terms absent voter approval of a change. In the case of Lakewood's business and occupation tax on telecommunications, the city had no control over the externally driven changes to the nature of telecommunications services and simply sought to conform to federal and state law while continuing to tax the same thing. Even one such external factor forming the basis for a tax code change should be sufficient to show that any de minimis revenue increase was incidental to that primary purpose if the substance of the thing taxed remains essentially the same. In such circumstances, a municipality should not be viewed as imposing a new tax, tax rate increase, or tax policy change directly causing a net tax revenue gain.

The district court failed to follow *TABOR Foundation*'s reasoning despite agreeing that Lakewood's ordinances stated non-revenue purposes and effected those purposes. Lakewood addressed two external forces, as have dozens of other Colorado municipalities that have enacted a similar business or occupation tax on

telecommunication services and amended those taxes without an election. First, changes to state and federal laws mandated that local governments "level the playing field" for new market entrants in the telecommunications field formerly dominated by a monopoly. *See* 47 U.S.C. § 253(a) (prohibiting states and local governments from restricting ability of an entity to provide telecommunications service); C.R.S. § 38-5.5-107(2)(a) (requiring local governments to be "competitively neutral among telecommunications providers"). Second, federal and state changes to the telecommunications industry were compounded by the evolution of technology in the same field that eventually became the primary means of providing telecommunications service.

As the district court recognized, local governments cannot predict how technology and services are going to change over time. Permitting definitional updates to account for those changes without requiring a TABOR vote is not only reasonable but necessary. New technology and services should not be able to escape taxation by virtue of the inability of a government to forecast technological or market changes, otherwise government entities would always be chasing votes to keep their code up to date. Such definitional updates clarify the applicability of an existing tax and do not expand the tax.

The district court discounted Lakewood's primary purposes simply because the city later received revenue that the court felt it was not previously entitled to receive, contrary to this Court's acknowledgment that a tax change to accomplish a non-revenue purpose can also tax things that were not previously taxed. *See TABOR Found.*, 416 P.3d at 106. The district court also improperly constrained Lakewood's choices to abandoning an existing revenue source or holding a TABOR election simply to keep revenue stable, essentially obviating the purpose of the *TABOR Foundation* analysis.

The ruling in this case will impact the ability of a government entity to ensure that other types of existing taxes will continue taxing the subject matter it was intended to tax despite changes outside of its control.[1] If affirmed, the district court's

[1] Under Colorado's complex and decentralized tax system, many local governments, including municipalities, counties, and some special districts, levy a variety of taxes on different things, services, and activities through statutory and constitutional authority, including sales tax, use tax, lodging tax, and, as in this case, a business and occupation tax. *See, e.g.*, COLO. CONST. art. XX, § 6; *Berman v. City & Cnty. of Denver*, 400 P.2d 434, 436-37 (Colo. 1965) ("The right to levy a tax to raise revenue with which to conduct the affairs and business of the City is clearly within the constitutional grant of power to home rule cities contained in Article XX, Sec. 6 of the Constitution of Colorado."); C.R.S. § 31-15-501(1)(c) (authorizing municipalities to regulate business in their jurisdiction, which includes taxation of any lawful occupation or business); C.R.S. § 29-2-105(1)(d) (authorizing statutory municipalities to impose sales tax that largely aligns with the state sales tax base); C.R.S. § 29-2-109 (authorizing municipal use tax on motor vehicles and building materials).

decision will cripple the ability of municipalities to adjust existing taxes to account for external factors or to achieve other important purposes.

Preliminarily, it is absurd to suggest that municipality is stuck with the same language in its tax ordinances forever, unless voters approve a change. Using information available to them at the time, state and local legislatures define the scope of the tax and any exemptions through available terminology at the time of adoption. That terminology helps taxpayers to understand how the tax applies and avoid challenges for vagueness and ambiguity. However, terminology can become outdated, difficult to implement, or otherwise troublesome for the efficient administration of the tax system and the production of revenue to support public services. Revisions are needed because courts will not extend tax provisions beyond their clear language or by analogy. *City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361, 367 (Colo. 2003) (internal quotation marks omitted). Far from seeking to raise revenue, changes to terminology are necessary to preserve revenue or accomplish other reasonable, non-revenue purposes that are outside of TABOR's reach.[2]

[2] The fact that Lakewood lowered its per line tax rate, similar to RTD stopping the taxation of some items while starting to tax others in *TABOR Foundation*, further supports "that increasing revenue [was] only an incidental effect" and not the primary purpose. 416 P.3d at 106.

Externally driven changes also highlight a common tension between using a vague definition that covers a wide spectrum of taxable activity and a more specific definition that may not clearly cover changing technology, services, or product variation. A specific definition provides better understanding for taxpayers and avoids wasting government revenue in legal challenges. Government should not be penalized for updating specific definitions to account for new technology or variations that are beyond its control, particularly when the new technology or variation replaces the specific thing but serves the same purpose. If the converse is true, then TABOR's purpose of reasonably restraining government growth would turn into a mechanism to avoid existing taxes, leading to a reduction in government overall.

Several examples illustrate non-revenue purposes that might motivate modifications to tax ordinances that should not be subject to a voter approval requirement. For example, many municipal lodging taxes were initially levied to tax short-term overnight lodging, which historically has been performed through the direct rental of hotels, motels, bed and breakfasts, and similar commercial establishments. First, municipalities had to account, through existing taxes, for the provision of lodging through online third-party services. *See City & Cnty. of Denver v. Expedia, Inc.*, 405 P.3d 1128, 1138 (Colo. 2017) (holding that a lodging tax

imposed a duty on online facilitator to collect and remit lodging tax). Similarly, the rise of short-term rentals of residential properties through third-party online facilitators like Airbnb and VRBO as a common alternative to traditional lodging establishments could not have been anticipated as something that a taxing entity would need to include within its concept of lodging. Municipalities updated their definitions to account for this new lodging type under their lodging tax and to account for collection of the tax in a new system facilitated by third parties. A similar example arises with taxation of car rentals and the later rise of a new similar activity – peer-to-peer car sharing. These actions created a level playing field and ensured the clear application of the tax.

Other technological changes push changes to tax laws that do not require elections. The evolution of music mediums over decades is illustrative, going from vinyl records to 8-tracks to cassette tapes to CDs to MP3s to streaming. Other digital media that could not have been contemplated when municipalities first imposed sales and use taxes on tangible personal property continue to be viewed as taxable despite the change in form. *See, e.g., Am. Multi-Cinema, Inc. v. City of Aurora*, 471 P.3d 1139, 1141 (Colo. App. 2020), *cert. denied* 471 P.3d 1139 (2020) (city's use tax continued to apply to movie licensing fees despite change to digital media); *Ball Aerospace & Techs. Corp. v. City of Boulder*, 304 P.3d 609, 612 (Colo. App. 2012)

(city's use tax continued to apply to software that was downloaded instead of installed from physical media). Municipalities should be able to adopt legislative acts and regulations, without a vote, to clarify that an existing tax still applies to what is essentially the same thing and preserve – not raise – revenue to ensure the continued operation of government.

Lastly, efforts to simplify the administration and collection of taxes to create more consistency statewide involve modifying definitions and terminology. For years, the business community, CML, and certain governments have been working on the simplification and modernization of local taxation through formal and informal efforts. *See*, *e.g.*, C.R.S. §§ 39-26-801 to -804 (establishing the Sales and Use Tax Simplification Task Force); C.R.S. § 39-26-128(1)(a) (directing the Department of Revenue to recommend uniform definitions and exemptions). Since the early 1990s, CML has worked with the business community and other stakeholders to standardize sales and use tax definitions for consideration and possible adoption by the self-collecting home rule municipalities in Colorado.

When a municipality amends tax ordinance definitions to more uniformly align with corresponding state definitions or other municipalities, the municipality has several goals, including easing the burden on businesses. These simplification efforts are intended to be revenue neutral but still could result in a particular

transaction not previously taxed being subject to taxation. Similarly, modifying ordinances to accommodate technological developments or government influence that changes the thing taxed have legitimate purposes and an expectation of revenue neutrality. In either case, municipalities should not be subjected to challenges over every mere change to a definition, forced to forgo an existing revenue stream, or required to create a new tax exemption in contravention of the "strong presumption that taxation is the rule and exemption the rare exception." *Colo. Dep't of Revenue v. Woodmen of the World*, 919 P.2d 806, 810 (Colo. 1996).

Because a modification to account for outside influences on the nature of the thing taxed results in the taxation of essentially the same thing, the Court can avoid the concern raised by the Court of Appeals in *HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236, 242 (Colo. App. 2008). In that case, a city expanded its use tax on construction and building materials to a tax on all tangible property. Here, Lakewood taxed the same thing, notwithstanding variations in definitions that described the reality of the time. Lakewood's 1969 business and occupation tax taxed the provision of telecommunications service in the city as that business and occupation existed in 1969. Over the years, the government's deregulation of the telecommunications monopoly, technological advances, and consumer preferences changed the nature of that business and occupation. Lakewood's later ordinances

were modified to tax the business and occupation of providing telecommunications service as it existed in 1996 and 2015.

TABOR does not force governments to grant an exemption from an existing tax or require voters to approval to continue taxing the same thing. This Court, in *TABOR Foundation*, recognized that governments have legitimate purposes that are not primarily directed at raising revenue. This Court understood that any decision regarding a tax law would inherently have at least some impact on revenue and placed no restriction on the legitimacy of the purposes that legislatures might need to accomplish. Evolutions in technology, market factors, and outside regulation of a taxed thing justify modifying tax ordinances without an election to account for these factors, and not to raise revenue.

B. The revenue impact of a tax code change must be evaluated from a reasonable perspective at the time the change is made.

CML urges this Court to provide additional clarity for municipalities as to how they should evaluate the revenue impacts of proposed tax code modifications that are being made for non-revenue-based purposes. This Court's practical approach to limiting TABOR's application to changes to tax laws derives from the absurdity and wastefulness of requiring a costly election to obtain voter approval for a de minimis revenue increase. *See Mesa Cnty. v. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 529 (Colo. 2009) (rejecting this interpretation on grounds it "unreasonably

curtail[s] the everyday functions of government"). That practicality is destroyed if the standard requires an equally expensive analysis to project future revenue. Further, government entities are deprived entirely of the benefit of this Court's ruling in *TABOR Foundation* if they cannot rely on available information and, instead, tax changes are evaluated using data that could not reasonably be determined at the time of the change. Government entities and the lower courts need guidance that makes clear the review of revenue forecasting be done from the perspective of a government using information that was reasonably available at the time of the tax code change.

Here, the district court went far beyond looking at the projected revenue considerations that this Court examined in *TABOR Foundation.* The practicality of looking at the revenue effect of a tax change was obliterated by the district court's assessment of decades of actual revenue data following the imposition of the change, using information that no government could reasonably project at the time it adopted the change. When deciding whether a TABOR election was required, no municipality could have reasonably looked that far into the future. This is especially true when the purpose was to account for a change to accommodate a tectonic shift in the business and occupation taxed.

The district court sets a dangerous precedent in suggesting that years' worth of subsequent data that was not available at the time could invalidate an ordinance.

Notably, TABOR's ballot issue notice provisions require only an estimate of the tax increase for the first full fiscal year. COLO. CONST. art. X, § 20(3)(b)(iii). Further, even if feasible, in-depth forecasting may necessitate consulting with experts or conducting detailed studies that require expenditure of taxpayer money. This risk is heightened when it comes to smaller municipalities with small staff and limited resources.

Moreover, in examining Lakewood's revenue increase over such a long period, the district court imposed an impossible burden on the municipality by attributing all revenue impacts to the city's ordinance instead of considering other influences on revenue. Many factors impact how municipal revenue may change in the future, unrelated to the local legislative act at issue and municipalities cannot reasonably anticipate all of them, nor should they be required to do so. For example, new businesses entering the market, a rise in consumer interest in a particular service or product, inflation, and other economic and market influences. While municipalities need to be able to accurately forecast a revenue impact, they should only be expected to do so within reason. There will be no certainty for government revenue streams if they can be challenged years or decades later based on information that was not reasonably available at the time of the legislative change – a standard that would be impossible to meet.

CML encourages this Court to hold that external factors that may increase municipal revenue do not factor into the analysis of whether a revenue increase is de minimis and instead, must focus on the impact of the legislative act of the municipality alone. *See Griswold v. Nat'l Fed'n of Indep. Bus.*, 449 P.3d 373, 381 (Colo. 2019) (explaining that a revenue increase due to external factors is incidental and de minimis because there was no showing that the increase was triggered by the government regulation at issue). This would ensure governments have an appropriate level of certainty when conducting their forecasting, evaluating revenue streams, and planning for the future.

Finally, the de minimis evaluation should be conducted in light of an entity's entire budget as in *TABOR Foundation*, 416 P.3d at 106-07 (evaluating the increase as compared to RTD's total annual tax revenues and budget), and in consideration of the fiscal burden on municipalities if this Court were to require TABOR votes for minimal revenue increases.

II. The Court should not revisit its construction the "beyond a reasonable doubt" burden of proof standard.

Finally, the district court's order effectively lowered the burden on the taxpayer to challenge the constitutionality of a tax ordinance under TABOR despite Colorado's long-established rule that all statutes are presumed constitutional unless proven unconstitutional beyond a reasonable doubt. *See id*. at 104; *see also*, *e.g.*,

Alexander v. People, 2 P. 894, 900 (Colo. 1884); *Rathke v. MacFarlane*, 648 P.2d 648, 655 (Colo. 1982); *In re Dwyer v. State*, 357 P.3d 185, 188 (Colo. 2015). A "constitutional flaw must be so clear that the court can act without reservation." *TABOR Found. v. Reg'l Transp. Dist*., 417 P.3d 850, 858 (Colo. App. 2016).

The district court's application of the burden of proof, if affirmed, would impose unyielding requirements on municipalities seeking to make reasonable, non-revenue changes to tax codes. The district court found that the taxpayer established unconstitutionality beyond a reasonable doubt by misapplying *TABOR Foundation*, improperly discounting the express and effected purposes of Lakewood's ordinances, and reviewing the revenue effect of the modification from an unreasonable vantage point. The district court should have developed sufficient reservation when it acknowledged both the express and effected purposes of Lakewood's ordinances. The district court improperly chose an unconstitutional construction of the ordinance when a constitutional construction was possible. *Cf. Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011) (internal citations omitted).

To exempt TABOR from the beyond a reasonable doubt standard also would invite claims calling for a modified standard of review for other constitutional provisions. It may also result in TABOR being prioritized over other constitutional

principles, such as the separation of powers doctrine. *See* Laura J. Gibson, *Beyond a Reasonable Doubt: Colorado's Standard for Reviewing a Statute's Constitutionality*, 23 COLO. LAW. 797, 835 (1994). For these reasons, CML encourages the Court to uphold the beyond a reasonable doubt standard.

CONCLUSION

For the reasons set forth herein, CML respectfully requests this Court hold that Plaintiff–Appellee MetroPCS of California, LLC failed to show, beyond reasonable doubt, that Lakewood's ordinances were unconstitutional as a new tax, tax rate increase, or tax policy change for which a TABOR election was required. The Court's decision will have significant consequences for municipalities and other local governments if a TABOR election is required anytime a definition or terminology used in a tax ordinance is changed, if a court can discount the legitimacy of the purpose effected by the change, and if the revenue impact is reviewed from an unreasonable vantage point. The decision in this case could affect dozens of other municipalities that have imposed and amended a similar tax on telecommunications for decades and extend to other tax modifications across the state that were intended to be revenue neutral.

Dated this 17th day of October 2024.

By: /s/ *Robert Sheesley*

Rachel Bender, #46228
Robert D. Sheesley, #47150
1144 Sherman St.
Denver, CO 80203-2207

Attorneys for Amicus Curiae
Colorado Municipal League

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October 2024, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT – APPELLANT CITY OF LAKEWOOD, COLORADO** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

David G. Mayhan, #15146
Sarah Smyth O'Brien, #34172
Dalton Kelley, #53948
Butler Snow LLP
1801 California Street, Suite 5100
Denver, Colorado 80202
david.mayhan@butlersnow.com
sarah.obrien@butlersnow.com
daltonkelley@butlersnow.com

Amanda G. Taylor (pro hac vice)
Butler Snow LLP
1400 Lavaca St., Suite 1000
Austin, Texas 78701
amanda.taylor@butlersnow.com

Alison McKenney Brown, #50636
John Allen VanLandschoot, #45001
Patrick Theodore Freeman, #42982
Lakewood City Attorney's Office
480 S. Allison Parkway
Lakewood, Colorado 80226
abrown@lakewood.org
johvan@lakewood.org
pfreeman@lakewoodco.org

Neil I. Pomerantz, #24741
Mark E. Medina, #23613
Michelle Bush, #38443
Silverstein & Pomerantz LLP
100 Fillmore Street, Suite 435
Denver, Colorado 80206
Telephone: (303) 991-2501
Facsimile: (303) 991-2502
npomerantz@sptaxlaw.com
mmedina@sptaxlaw.com
mbush@sptaxlaw.com

/s/ *Robert Sheesley*
Robert D. Sheesley #47150
General Counsel
Colorado Municipal League