IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action File No. C-1817

JEAN L. ADAMS, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
THE CITY OF COLORADO SPRINGS, et al.,	)
	)
	)
Defendants.	)

MEMORANDUM BRIEF OF AMICUS CURIAE

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INTRODUCTION

The undersigned attorney who represents Amicus Curiae, the Colorado Municipal League, which is a voluntary association of 218 cities and towns, submits this brief in support of the City of Colorado Springs and in support of the constitutionality of the Colorado Municipal Annexation Act of 1965.

STATEMENT OF THE CASE

This case arises through an action brought by multiple plaintiffs alleged to be qualified and taxpaying electors of certain unincorporated territory adjacent to the City of Colorado Springs to have declared invalid and permanently enjoined the pending unilateral annexation of Plaintiffs' properties by Defendant, City of Colorado Springs. Plaintiffs raise numerous issues regarding interpretation and constitutionality of the Municipal Annexation Act of 1965, Colo. Rev. Stat. 139-21-1 to 23 (1963), as amended, hereinafter simply referred to by section numbers. Boiled down to fundamental issues, Plaintiffs argue that the Municipal Annexation Act as applied to Plaintiffs violates their constitutional rights to due process and equal protection secured by the Fourteenth Amendment to the United States Constitution. Specifically, Plaintiffs attack those provisions of the Municipal Annexation Act which (1) permit a municipality under specified circumstances to unilaterally annex territory without consent of the resident taxpayers, and (2) limit the scope and method of review, including the injunctive powers, of courts in annexation proceedings.

SUMMARY OF THE ARGUMENT

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ARGUMENT

I. THE PROCEDURE ESTABLISHED BY A STATE FOR ALTERATION OF MUNICIPAL BOUNDARIES DOES NOT INVOLVE SUBSTANTIAL OR JUSTICIABLE FEDERAL QUESTIONS.

Plaintiffs base their case before this Court on the assertion that due process and equal protection rights are involved in the statutory procedure provided by a state for adjustment of the boundaries of its political subdivisions. In a series of decisions spanning nearly a century, the federal courts have indicated that the procedures adopted by state legislators in creating and abolishing political subdivisions, or in changing boundaries thereof, do not involve justiciable or substantial issues under the Fourteenth Amendment to the federal Constitution.

In the 1881 case of Kelly v. City of Pittsburgh, 104 U.S. 78, 26 L. Ed. 658 (1881), Kelly challenged the constitutionality under due process of a unilateral annexation, and subsequent municipal taxation, of farmlands. In upholding the annexation and the taxes levied pursuant thereto, the court enunciated the following basic principle:

> It is not denied that the Legislature could rightfully enlarge the boundary of the City of Pittsburgh so as to include the defendant's land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory must be settled so organized into a city, must be one of the matters within the discretion of the legislative body. Whether its territory shall be governed for local purposes by a county, city or township organization, is one of the most usual and ordinary subjects of state legislation. . . .
>
> They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States. . . 26 L. Ed. 658 at 659.

The leading case affirming the absence of federal constitutional issues involving boundary changes of political subdivisions is Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907). In that case Plaintiffs challenged the constitutionality of a Pennsylvania statute which permitted the smaller City of Allegheny to be consolidated into the City of Pittsburgh upon the combined vote of the electors of those cities. Since the numerical vote of the qualified electors of Pittsburgh outweighed the smaller, but opposing, vote of the qualified electors of Allegheny, Plaintiffs asserted that the involuntary consolidation of Allegheny was in violation of the Fourteenth Amendment to the United States Constitution.

In upholding the consolidation and the enabling statute, the court broadly enunciated this principle:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently, they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest in in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it. 207 U.S. 161 at 178-9.

The principle of state legislative supremacy, in the absence of state constitutional restrictions, in the adjustment of boundaries of political subdivisions as enunciated in Hunter has been followed since 1962 in four decisions of the United States Courts of Appeal. International Harvester Company v. City of Kansas City, 308 F.2d 35 (10th Cir. 1962), cert. denied 371 U.S. 948, 83 S. Ct. 503, 9 L. Ed. 2d 498 (1963), involved a suit by property owners to have a municipal annexation ordinance declared invalid. The trial court dismissed the action on the grounds that Plaintiffs, under Kansas law, had no capacity to sue and had presented no justiciable question under federal law. The court of appeals agreed with the district court that Kansas law limited the review of annexations to actions brought by the attorney general. Having no private remedy under Kansas law, the property owners contended that the statute violated the due process provisions of the Fourteenth Amendment. Quoting at length from Hunter v. Pittsburgh, supra, the Court of Appeals for the 10th Circuit concluded:

> Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions and the judgment of the trial court is accordingly affirmed. 308 F.2d 35 at 39.

In Hammonds v. City of Corpus Christi, 343 F.2d 162 (5th Cir. 1965), cert. denied, 382 U.S. 837, 86 S. Ct. 85, 15 L. Ed. 2d 80 (1965), certain property owners sought to have invalidated two annexation ordinances arguing that the selection of their property for annexation and the exclusion of other similar property in the area was arbitrary in denial of their right to equal protection, privileges and immunities and due process of law. (Texas law provided that the only conditions to annexation by a home rule city were that the territory be adjacent to the city and not included within the boundaries of another municipality.) The Court of Appeals for the 5th Circuit, citing Hunter and International Harvester Co., supra, affirmed the trial judge's decision that annexations have been held without exception to be a purely political matter, entirely within the power of the state legislature and thus presented no federal question.

The next court of appeals to consider the issue was the 6th circuit in 1967 in Detroit Edison Company v. East China Township School District No. 3, 378 F.2d 225 (6th Cir. 1967), cert. denied, 389 U.S. 932, 88 S. Ct. 296, 19 L. Ed. 2d 284 (1967). The Detroit Edison Company and other Plaintiffs brought an action for declaratory judgment that an annexation of two larger school districts to a school district in which Plaintiffs owned property and the assumption of bonded indebtedness of the two annexed school districts by the combined district violated their rights under the federal constitution. Under Michigan law, a school district could be annexed to another school district upon approval of the state superintendent of public instruction, together with an affirmative vote of the school electors in the annexed district and the affirmative vote of the board of education of the annexing district. The complaint alleged, similar to that of Plaintiffs in the case at bar, that the statute which permitted the annexation and debt assumption proceedings violated due process and equal protection because the individual plaintiffs were denied the right to vote on the annexation proposal and their voting power was debased and diluted since they were compelled to vote in common with other differently interested electors on the debt assumption issue. The Plaintiffs contended that they were discriminated against and had their voting franchise abridged as compared with that of electors in adjacent districts. Quoting at length from Hunter, and citing International Harvester Co. and Hammonds, supra, the court held that the annexation procedure was a legislative matter not justiciable under the due process or equal protection clauses of the Fourteenth Amendment.

Finally, Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967), cert. denied, 389 U.S. 975, 88 S. Ct. 476, 19 L. Ed. 2d 467 (1967), dealt with the constitutionality of an annexation ordinance and an annexation enabling statute which permitted a municipality to annex territory without consent of the affected property owners. The complaint also alleged that the ordinance and statute deprived the Plaintiff of due process and equal protection for the reasons, among others, that Plaintiff was not represented on the city council which enacted the ordinance and the Plaintiff was afforded no voice or vote on the annexation proposal. After quoting at length from Hunter, and citing the Hammonds and Detroit Edison cases, supra, the court at page 325 held:

> It is clear, for the reasons set forth in Detroit Edison Co. v. East China Township School District, supra, that Hunter precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of city taxation.

Amicus Curiae respectfully submits that the long line of federal cases heretofore cited require dismissal of this action for lack of any substantial or justiciable federal questions.

Many other authorities support the proposition that annexation procedures are a legislative matter within the discretion of each state legislature. Without belaboring or unduly lengthening this brief, this proposition is supported by such general legal authorities as 62 C.J.S. Municipal Corporations § 41 (1949), 37 Am. Jur. Municipal Corporations § 28 (1941), and 2 E. McQuillin, The Law of Municipal Corporations §§ 7.03, 7.16 (3d ed. 1966).

This rule has also been followed in Colorado. In Board of County Commissioners v. Denver, 150 Colo. 198, 372 P.2d 152 (1962), appeal dismissed for lack of a substantial federal question, 372 U. S. 226, 83 S. Ct. 679, 9 L. Ed. 2d 714 (1963), the Colorado Surpeme Court upheld an annexation by the City and County of Denver without a consenting vote of a majority of the qualified electors of the other counties from which the territory was annexed, holding that there was no denial of equal protection. In responding to the assertion that Jefferson County, by reason of Denver's action, was denied equal protection of the law, the Colorado Supreme Court upheld the annexation and emphasized that municipalities and counties exist for the convenient administration of government and are merely instruments of the state created to carry out the will of the state.

The Colorado Supreme Court also passed on the constitutionality of a provision in the former annexation act in Rogers v. City and County of Denver,

161 Colo. 72, 419 P.2d 648 (1966), appeal dismissed for lack of a substantial federal question, 386 U.S. 480, 87 S. Ct. 1175, 18 L. Ed.2d 224 (1967), rehearing denied, 386 U.S. 1042, 87 S. Ct. 1476, 18 L. Ed. 2d 616 (1967). In that action Plaintiffs argued that the statutory definition of landowners entitled to petition for or against an annexation was unconstitutional as an arbitrary and discriminatory classification in violation of due process and equal protection. The court, recognizing the plenary power in the absence of an express constitutional provision to the contrary of the state legislature over the boundaries of municipalities, upheld the annexation.

Only this year, the Colorado Supreme Court in Cline v. City of Boulder, 450 P.2d 335 (Colo. 1969), upheld, against a due process challenge, the provisions of the 1965 Municipal Annexation Act permitting unilateral annexation of enclaves. And, in construing other sections of the Municipal Annexation Act of 1965, the Colorado Supreme Court in City of Westminster v. District Court, 447 P.2d 537 (Colo. 1968), held that annexation review is a special statutory proceeding.

It is noteworthy that the United States Supreme Court in six of the cases cited above and decided since 1960 involving federal constitutional due process or equal protection attacks upon annexation procedures has chosen to deny certiorari or to dismiss the appeal for lack of a substantial federal question.

II. THE RECENT APPORTIONMENT AND SUFFRAGE DECISIONS OF THE SUPREME COURT ARE INAPPLICABLE TO STATE PROCEDURES GOVERNING POLITICAL SUBDIVISION BOUNDARY CHANGES.

Plaintiffs seek to circumvent, through a lengthy citation of apportionment and suffrage cases, the extensive body of law which denies any substantial or justiciable due process or equal protection constitutional issues relating to annexation procedures. It is submitted that these cases do not overrule or limit the Hunter line of cases and do not apply to determinations made by the electorate, or otherwise, which involve annexation or other adjustments in municipal boundaries.

It is conceded that the United States Supreme Court limited the broad language of Hunter in Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). This case involved a blatant attempt of the Alabama Legislature to alter the boundaries of Tuskegee so as to completely disenfranchise blacks from voting in city matters. The court held that the Hunter rule was not absolute and must yield to the specific limitation of the Fifteenth Amendment. (In citing other cases, the court also recognized that Hunter is limited by the prohibition against impairment of contract provided in Article 1, Section 10 of the Constitution.)

Significantly, however, the Supreme Court refused to follow contentions which were based on equal protection. In contrast the Court reaffirmed, with respect to the state's power over its political subdivisions, the "breadth and importance of this aspect of the State's political power." 5 L. Ed. 2d 114. With respect to the power of a state to alter municipal boundaries whereby citizens of a pre-existing municipality suffer serious economic disadvantage, the Court emphatically stressed that the due process clause "affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers." 5 L. Ed. 2d 114. The Court concluded by distinguishing the legitimate exercise of state powers from that used as an instrument for circumventing a federally protected right, the latter obviously being the case in Gomillion.

Furthermore, the four court of appeal cases heretofore cited have subsequently held that Hunter forecloses a challenge to an annexation procedure based on equal protection. Consequently, Gomillion should not be construed to diminish the authority of Hunter in annexation procedure cases where the constitutional claim is grounded in the due process or equal protection clauses of the Fourteenth Amendment.

The dilution or debasement of voting rights, which lies at the heart of the apportionment cases, has not been applied, and indeed is inapplicable, to annexation procedures. As the district court analyzed in Detroit Edison Co. v. East China Township School District No. 3, 247 F. Supp. 296 (1965), aff'd, 378 F.2d 225 (6th Cir. 1967), the apportionment cases create no constitutional rights in affected citizens concerning the procedure for creating or altering these districts. The right involved in apportionment cases is the weight of one citizen's vote in one electoral district to the weight of another citizen's vote in another district. The only limitation of the apportionment cases is that the state may not create electoral districts which have population disparity. As the district court noted in Detroit Edison, even where the Supreme Court held that district boundaries had to be altered, the court did not establish a specific procedure to accomplish this. Reynolds v. Sims, 377 U.S. 533 at 585, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

Plaintiffs have failed to cite any case, and Amicus Curiae is aware of none, in which a federal court has found a right to vote or to an equal vote with respect to annexations. As stated in Lucas v. Colorado General Assembly, 377 U.S. 713 at 744, 84 S. Ct. 1472, 12 L. Ed. 2d 632 (1964):

> It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been

> denied. Nobody's right to vote has been restricted. Nobody has been deprived of the right to have his vote counted . . . . The question involved in these cases is quite a different one. Simply stated, the question is to what degree, if at all, the Equal Protection Clause of the Fourteenth Amendment limits each sovereign State's freedom to establish appropriate electoral constituencies from which representatives to the state's bicameral legislative assembly are to be chosen.

The district court in Detroit Edison Co. case, supra, found that the apportionment cases seem to reaffirm, rather than change, the Hunter doctrine. In Reynolds v. Sims, supra, quoted from Hunter with apparent approval:

> Political subdivisions of States--counties, cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter . . . , these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) ... . and the territory over which they shall be exercised rests in the absolute discretion of the State.' U.S. 533 at 535.

Plaintiffs argue that Kramer v. Union Free School District, 89 S. Ct. 1886 (1969), and Cipriano v. City of Houma, 89 S. Ct. 1897 (1969), together with the apportionment cases, subject to annexation procedures to the scrutiny of the equal protection clause. Kramer involved a challenge of a New York school statute which limited the right to vote in elections for school board members and on various financial matters of the district to those who owned or leased property in the district or were parents of children attending district schools. The Court held that the equal protection clause prohibited the state from denying the franchise to other individuals otherwise qualified in the absence of a showing that the exclusion was necessary to promote a compelling state interest. Cipriano, which was a companion case, invalidated on equal protection grounds a Louisiana statute which limited the franchise on revenue bond issues of cities to taxpaying electors. Of paramount significance, however, is the fact that neither Kramer nor Cipriano involved annexation or adjustment of political boundaries. Both were limited solely to application of the franchise on public questions within existing public entities. Additionally, neither case specifically limited or mentioned the Hunter line of cases. Application of Kramer and Cipriano to annexation proceedings is not justified by the controlling cases and would seriously impair the judicially recognized need for state flexibility in local government reorganization.

III. ASSUMING, ARGUENDO, PRESENCE OF CONSTITUTIONAL ISSUES, THE ANNEXATION ACT MEETS DUE PROCESS AND EQUAL PROTECTION STANDARDS.

It is submitted that the controlling interpretations of the federal courts preclude a due process or equal protection review on the merits. Assuming, arguendo, that such a review is merited, a close analysis of the

Municipal Annexation Act of 1965 as applied to Plaintiffs' properties indicates that Plaintiffs' due process and equal protection rights have not been violated.

Let us examine the Act. The Act was drafted and sponsored by the Governor's Local Affairs Study Commission, a Commission created in 1963 for the purpose of studying and recommending improvements in local government. Section 2 of the Act declares its purposes:

> (1) (a) The general assembly hereby declares that the policies and procedures contained in this article are necessary and desirable for the orderly growth of urban communities in the state of Colorado. It is the purpose of this article:
> (b) To encourage natural and well-ordered development of municipalities of the state;
> (c) To distribute fairly and equitably the costs of municipal services among those persons who benefit therefrom;
> (d) To extend municipal government, services, and facilities to eligible areas which form a part of the whole community;
> (e) To simplify governmental structure in urban areas;
> (f) To provide an orderly system for extending municipal regulations to newly annexed areas;
> (g) To reduce friction among contiguous or neighboring municipalities; and
> (h) To increase the likelihood of municipal corporations in urban areas being able to provide their citizens with the services they require; and to these ends, this article shall be liberally construed.

The Colorado Supreme Court recently gave recognition to these purposes by acknowledging ". . . our legislative mandate to construe the statute liberally so as to expedite the extension of governmental services to eligible territories. . . ." City of Aspen v. Howell, 459 P.2d 764 at 765 (Colo. 1969).

Admittedly, the Annexation Act of 1965 significantly changed the old law, Colo. Rev. Stat. art. 10, ch. 139 (1963). It was passed at a time in which the inability of our cities under restrictive annexation procedures to keep pace geographically with urban post war growth and sprawal had become apparent. Provisions facilitating annexation of territory were intentionally included because the legislature recognized the importance or necessity of such policies as encouraging well-ordered urban growth, equitably distributing costs of municipal services among those who benefit, extending municipal services to urban areas forming a part of the whole community, and curtailing or reducing the fragmented and proliferated local government structure which was developing in the state.

Plaintiffs seek to characterize the Act as (1) an invidious law empowering cities to arbitrarily gobble tax base for selfish purposes without benefit to the taxpayer, and (2) providing a discriminatory procedure whereby almost everyone except plaintiffs has a voice or veto in a potential annexation. These characterizations are groundless. The Act provides essentially five methods by which annexation may be accomplished, all necessitating at least a 1/6th boundary contiguity:

(1) A petition filed by landowners of more than 50% of the annexed territory (Section 6 (1));

(2) A petition for an annexation election by the qualified electors who are resident in and who are land owners of the area proposed to be annexed in stated number followed by an annexation election (Section 6 (2));

(3) Annexation of enclaves surrounded by a municipality for a period of not less than three years (Section 5 (1));

(4) Annexation of unincorporated areas which have had more than 2/3rds boundary contiguity with a municipality for a period of not less than three years -- so-called peninsulas (Section 5 (2)); and

(5) Unilateral annexations by municipalities of unincorporated city-owned land (Section 5 (3)).

Plaintiffs emphasize annexation methods 3 and 4 which permit a city council, assuming certain conditions are met, to unilaterally annex territory. What Plaintiffs have failed to mention, however, is that the unilateral provisions of methods 3 and 4 are available to the landowners of the eligible territory pursuant to Section 6 (5). In other words, that section provides that where the landowners petition for annexation pursuant to methods 1 or 2 and the proposed territory is either an enclave or a peninsula as defined in methods 3 and 4, the city council of the municipality must annex the territory. The legislature has provided a specific mandamus remedy in the event that a municipality fails to annex the territory within one year.

Consequently, the unilateral annexation provisions of the Act favor neither the city nor the landowner. Rather, the Act evidences a clear and impartial policy that when lands become surrounded or nearly surrounded by a municipality, those lands should become a part of that municipality if either the city or a majority of the landowners in the territory desire annexation. The legislature's policy is simply that territory so closely connected with a municipality as to be surrounded or almost surrounded ought to be annexed without opportunity for veto by either party.

The five methods for annexation provided in the Act constitute an entirely rational procedure for extension of municipal boundaries. If a municipality does not have at least a 1/6th boundary contiguity with the territory, annexation is prohibited. If the boundary contiguity is more than 1/6th but less than 2/3rds, annexation should be permissable providing it is approved by both the governing body of the municipality and the eligible electors. But where the land is completely surrounded by the city, or is almost surrounded by the city (2/3rds boundary contiguity), it is important that

neither the landowner nor the city council be able to prevent the annexation of territory to the municipality.

What is more reasonable than a law prohibiting a municipality from refusing to annex and serve an enclave or peninsula, for example, which has a deficient tax base? On the other hand, what can be more reasonable than to require residents and owners of territory constituting enclaves and peninsulas to annex and thereby support economically and with leadership the activities of the government to which they are practically, if not politically, associated. To invalidate these unilateral annexation provisions would be to sanction veto powers for the 20% of the state population which resides in unincorporated areas over the overwhelming percentage of the urban population (and 80% of the state population) residing within our cities and towns. The Colorado General Assembly realized, like other states have belatedly recognized, that veto powers in such annexations tend to proliferate units of local government and to deprive core areas of the growth necessary to retain social, economic, cultural and leadership vitality. The compelling state need for the unilateral provisions of the Act from the fiscal standpoint alone, was expressed at page 450-1 of the 1959 report of the Governor's Tax Study Group, Financing Government in Colorado:

> The current statutes regulating annexation of territory to municipalities have fiscal implications which have not been adequately recognized in the State of Colorado. This specific problem is of concern to all of the larger cities in the State and is not alone a problem peculiar to the City and County of Denver, although it is perhaps more urgent there than in any other city in the State.
>
> As the core of a large urban area which surrounds it, Denver is confronted with jurisdictional paralysis imposed by the limitations provided in the State annexation statutes. The limiting factor in current annexation law is the provision which prohibits a municipality from annexing territory without petition and approval of the property owners and qualified electors therein. Prima-facie, this appears to be compatible with the principles of democracy. Upon examination, however, it may be seen that such a law is the matrix of governmental confusion within any given urban area. The provision permits any group of citizens however large or small to initiate tax colonies upon the borders of the core city which supplies the economic life-blood of the entire area and to which the colonies owe their very existence.
>
> Further examination will reveal that such a procedure is not democratic at all for it permits segments of the economic entity to escape its fundamental responsibility to the social and economic area of which it is inextricably a part.
>
> Furthermore, the colonies create an intricate pattern of commingled problems, the solution of which can be attained in no other way short of governmental consolidation. It is ironic that a community which works and must necessarily think alike is prohibited from seeking its common ground in the business of government.
>
> The fiscal problems generated by the fragmentation of the economic and social entity are obvious. The entire urban area creates a demand for the usual municipal services and has little

respect for jurisdictional boundaries established by law. Such demands call for revenues which the economic entity must forfeit for such purposes. Political subdivisions block the necessary flow of income into a single government, however, and each subdivision tends to become unbalanced both economically and financially. Therefore, no jurisdictional fragment of the entity is fiscally capable of meeting the problem alone, yet the laws permit no alternatives.

To illustrate the significance of this problem, one need only to look at the states of Texas and Virginia. These states have recognized that the fundamental purpose of municipal government is to provide social amenities to people and to exact taxes from all who benefit directly or indirectly from such amenities. As such, the State of Texas permits municipalities to annex territory by ordinance so that those who enjoy the fruits of the municipality may also participate in its continuance. In Virginia, the municipality petitions the district court for permission to annex its periphery when such can be identified as urban and when the municipality is capable of servicing the area.

In the field of international affairs there is a term "balkanization" which everyone interprets as the converse of stability. In Colorado's municipal affairs, however, balkanization is defended as virtuous and preferable. It would appear that as the metropolitan area grows, the more virtuous balkanization becomes. Witness the crop of incorporations and special districts that have sprung up in the territory that was once Denver's hinterland. (See Table 11.)

Table 11

Units of Government in
Denver Metropolitan Area
1957

Unit	Number
Counties	4
Incorporated places	21
School districts	52
Special districts	124
Total units of government	201

Source: Colorado State Tax Commission, Annual Report, 1957.

The consequences, of this pattern of local government, which has been and is being established within Colorado's urban areas, must lead inexorably to inefficient use of government, excessive and needless taxes, the loss of democratic government on the local level, and urban chaos.

Much could be done to avert this headlong rush to an end which no one really wants. Some urban problems are in fact superficial and self-imposed merely for the lack of a realistic approach to the jurisdictional conflict between a municipality and its economic and social spheres More liberal laws to permit annexation prior to the urban build-up in the periphery would solve many problems.

A great deal could be accomplished by the State Legislature in this regard, for it must be recognized that the municipality is a bona fide instrument of government and if it is not, legislation should be enacted to abolish it for an acceptable substitute.

In an age when most thoughtful people are pleading for a return of "local" government, it is logical and right for a superior level of government to assist the metropolis in its effort to seek its salvation.

Rather than depriving a few of some "intangible right," the Act really encourages sound urban government growth and makes possible the sharing of municipal benefits and burdens. Plaintiffs, understandably, would like to

continue to receive the economic and job benefits of an adjacent city, facilities of a city library, access to city park and recreational facilities, the use of city streets, and so forth. The Act seeks to encourage provision of these services, plus others, such a police and fire, with a corresponding and equitable sharing of those costs.

In addition to fiscal reasons, there are compelling planning and service reasons for insuring that the entire urban area is served by the same local government. Local governments are the principal planner and regulator of urban development. Comprehensive plans project the public transportation, public facilities, capitol improvement and land use needs of the urban area. Zoning, subdivision, building and related regulations implement these plans to the extent that local government boundary jurisdiction permits. Enclaves and peninsulas, if permitted to remain unincorporated, escape benefits and controls of municipal planning, frustrating logical and coordinated urban development.

Enclaves and peninsulas likewise hamper provision of municipal services. The inability of the city to exercise some control over extension of municipal boundaries complicates and may increase the costs of providing such essential services as water, sewer, police and fire protection, as well as park, recreation and library facilities. Whether it is the extension of a water line, the capacity of a sewage disposal plant, or the uniform application of regulatory ordinances throughout the urban area, a compelling need exists to encompass within a single municipality all the urban territory which logically belongs with that city. The purposes enunciated in Section 2 also suggest a significant legislative policy of simplifying governmental structure and avoiding governmental proliferation so as to make possible more responsible and responsive local government.

The Colorado General Assembly in recognizing the necessity for avoiding glaring gaps left by enclaves and peninsulas and the problems of irregular boundaries has chosen a reasonable and equitable procedure which precludes either the city or the property owners from vetoing such an annexation. These procedures are consistent with due process and equal protection. It is vital that the General Assembly retain flexibility in controlling the development and reorganization of local government.

Plaintiffs emphasize the provisions of Section 4 (3) which require the consent of the landowner before annexation of one or more tracts or parcels of real estate (1) comprising 20 acres or more, and (2) having an assessed valuation in excess of $200,000. (Assessed valuation is 30 percent of actual value in Colorado.) It should be noted, however, that none of the

property affected by the proposed annexations is alleged by Plaintiffs to fall within Section 4 (3), so that the Act as applied to the facts herein cannot be said to discriminate against Plaintiffs.

In any event, a veto provision for the owner of such a tract as to his tract alone is reasonable. For such a landowner the impact of unilateral annexation is apt to be much greater. Furthermore, although his taxes will be much greater, these tracts are perhaps less likely to require a full complement of municipal services. Large acreage tracts are more likely to be agricultural in character and less in need of immediate city services. On the other hand, tracts of such acreage and valuation may contain industrial complexes less dependent than the average home owner or businessman on the city's services. Such tracts may have independent or alternative sources of service such as water, sewer, police and fire protection. Consequently, these tracts may be in a position to benefit substantially less from an annexation while suffering the predicament of paying substantially more. Significantly, the General Assembly provided in Sections 4 (3) and 5 (1) that any territory, regardless of acreage or assessed valuation is subject to unilateral annexation if it constitutes an enclave. The Act recognizes that when a territory becomes so much a part of a city as to be surrounded, other considerations cannot justify providing its landowner with power to prevent the annexation.

Last year the Colorado Surpeme Court had the opportunity to pass on a similar provision in the metropolitan recreation district act which excepted tracts used for industrial purposes having an assessed valuation greater than $25,000 and tracts of forty or more acres used primarily for agricultural purposes. In District 50 Metropolitan Recreation District v. Burnside, 448 P.2d 788 (Colo. 1968), the Colorado Supreme Court upheld the provision as consistent with equal protection requirements. The Court held that the exclusion was reasonable from consideration of the type of district involved and property excluded. The Court noted that the property excluded would not benefit from, or have any use for, playgrounds, golf courses and swimming pools.

Regardless of this Court's consideration of the reasonableness of Section 4 (3), the Section is not controlling on the issues at bar. None of the Plaintiffs or property subject to annexation are alleged to fall within the provisions of Section 4 (3) and the General Assembly has explicitely provided in the Municipal Annexation Act, by Colo. Laws ch. 306, § 24, (1965), that its provisions are severable:

> If any provision of this act, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not effect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

All other provisions of the Act can readily be given full effect consistent with the purposes of the Act.

The Colorado Municipal League offers one further comment with respect to unilateral annexation provisions. Plaintiffs indicated in opening oral argument and imply by brief the notorious or unique nature of the Colorado Municipal Annexation Act. While one million Frenchmen can be wrong, and numbers are not the test of constitutionality, it is important that this Court have the facts. In perhaps the most exhaustive national study of annexation, Adjusting Municipal Boundaries - Law and Practice, published in 1966 by the Department of Urban Studies for the National League of Cities, the extent of unilateral annexation provisions is reported at page 64:

> Annexation without required consent is established in at least 32 states by laws that provide some 76 methods of unilateral annexation albeit of often limited application, in which the area neither initiates nor consents to the annexation.

IV. ASSUMING, ARGUENDO, PRESENCE OF CONSTITUTIONAL ISSUES, THE STATUTORY LIMITATIONS ON REVEIW OF ANNEXATION PROCEDURES ARE CONSTITUTIONAL.

Should the Court find Hunter and its related cases applicable, it need not consider Plaintiffs' objections to various limitations on judicial review set forth in the Municipal Annexation Act. See, for example, International Harvester Company v. City of Kansas City, supra, where the 10th Circuit held a claim that the Kansas annexation act, limiting judicial review to an action brought to the Attorney General violated due process, presented no justiciable federal question. Assuming, arguendo, justiciability of this general issue, the specific objections of Plaintiffs are lacking in merit.

Plaintiffs assert that the Act unconstitutionally limits review of judicial proceedings by preventing a constitutional review. However, Section 15 (3) provides that judicial review of annexation proceedings shall be limited to determine whether the city council has exceeded its jurisdiction or abused its discretion. If the council is proceeding under an unconstitutional statute, it is exceeding its jurisdiction and the constitutional issue can therein be raised. Furthermore, the Colorado Supreme Court in Cline v. City of Boulder, supra, specifically reviewed the issue of constitutionality of the unilateral enclave provision in an action apparently brought pursuant to Section 15 (3). Additionally, the Act does not preclude a direct challenge of its constitutionality in state courts, pursuant to the Declaratory Judgment Act, Colo. Rev. Stat. art. 11, ch. 77 (1963). Section 22 of the

Annexation Act specifically provides that the powers conferred and limitations imposed by the Act are in addition to and supplemental to, not in substitution for, powers conferred by any other law.

Plaintiffs also challenge the power of the General Assembly to limit the scope of review and require substitution of judges who come from districts not affected by the annexation on the grounds that these limitations somehow violate Article 4, Section 4, of the United States Constitution guaranteeing every state a republican form of government. It is well-settled, however, that questions arising under the republican form of government provision are political questions which present no justiciable issues. Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930), and Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed.2d 663 (1962)

Plaintiffs further claim that judicial review limitations in the Act violate Article III and Article VI of the Colorado Constitution relating to separation of powers--an issue of state law which the Colorado Supreme Court has apparently decided. In the 1968 case of City of Westminster v. District Court, supra, the Colorado Supreme Court specifically upheld the prohibition in the Annexation Act of 1965 relating to stay orders or injunctions pending final review and reaffirmed that annexation review is a special statutory proceeding.

Plaintiffs contend that the provisions of Section 16 prohibiting the granting of a stay order or injunction by a court pending final judicial review of an annexation proceeding, coupled with the provisions of Section 16 making all ordinances applicable on the effective date of the annexation and providing that no subsequent voiding of an annexation shall invalidate actions thereunder, violate due process. The Colorado Supreme Court in the 1968 case of City of Westminster v. District Court, supra, (1) construed Section 16 to prohibit an injunction or stay order pending final review, and (2) upheld the constitutionality thereof. See also, Denver Local Union No. 13 v. Perry Truck Lines, Inc., 106 Colo. 25, 101 P.2d 436 (1940), where the Court upheld as a matter of substantive law a statute prohibiting courts from issuing injunctions pertaining to certain labor matters.

Prohibition of an injunction pending final review of an annexation proceeding is a reasonable exercise of legislative discretion, particularly in light of the established legislative nature of annexation proceedings. The General Assembly has enacted a statute with the stated purpose of facilitating annexation of territory. If injunctive relief were available, affected parties might be inclined to challenge annexations for the sole or

primary purpose of delaying the effective date of the annexations. Unlike in many other types of cases, in the absence of an injunction Plaintiffs will benefit from the availability and provision of municipal services. Furthermore, the General Assembly has provided in Section 15 (6) that all proceedings for judicial review of annexation proceedings shall be advanced as a matter of immediate public interest and concern. As the Colorado Supreme Court reasoned in City of Westminster v. District Court, supra,:

> We are persuaded that the legislature was required to provide the specific guidelines that it did pending review proceedings, less the disputed territory be left suspended in some no-man's land, with the citizenry of the territory left without clearly defined governmental services or obligations to any governmental entity. The legislature had two alternatives in case the annexation proceedings were judicially challenged. It could have provided that the county laws governing the unincorporated area would continue in force until the question was resolved; or, that the annexing municipality apply its ordinances and laws to the annexed area. It adopted the latter course. Additionally, it appears to us that the logical course is the one pursued by the legislature because of the question of necessary governmental services. Fire and police protection must be afforded the inhabitants by someone, and taxes must be paid. It is certainly easier for taxes to be paid initially to the municipality than to attempt to collect them at some later date for the time when the annexation is being challenged. In turn, municipal services by virtue of the same provision must be afforded the territory. 447 P.2d 537 at 540.

It is well settled that under certain circumstances Congress can limit or prohibit the federal courts from issuing injunctions. Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed 834 (1944). In that case the Supreme Court upheld against a due process challenge an act of Congress which prohibited the federal courts from issuing temporary injunctions against maximum price regulations. The Court at page 858 (88 L. Ed. 834) cited numerous statutes which restrict the power of federal courts to issue injunctions and numerous cases in which it has approved legislation permitting summary action subject to later judicial review. In Enochs v. Williams Packing and Navigating Co., 370 U.S. 1, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962), the Court upheld a tax statute prohibiting issuance of injunctions in tax collection matters even if collection would cause an irreparable injury, such as ruination of the taxpayer's enterprise.

Finally, in evaluating contentions that the judicial review proceedings of the Annexation Act fail to meet due process standards, it is appropriate to consider the contentions in historical prospective. History is relevant and significant in ascertaining due process requirements. Cohen v. Hurley, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961). Injunctive remedies have always been discretionary with courts of equity. Traditionally, preventative relief has been the exception rather than the rule. Federal and state case law have consistently recognized annexation procedures to be within

the province of the legislature. The Hunter cases have consistently held that annexation proceedings do not raise justiciable issues under the due process or equal protection clause. Federal statutes for years have limited types of remedies, including injunctions, available in federal courts.

Significantly, absent a statute to the contrary, the general rule at common law denied standing or the capacity of any private party to attack the fixing or extension of municipal limits or boundaries. 13 A.L.R.2d 1279. If the common law prevented review of an annexation by a private party and the matter has been established to be within the province of the legislature, Plaintiffs cannot seriously question on due process grounds review limitations provided in the 1965 Annexation Act.

CONCLUSION

The Colorado Municipal League as Amicus Curiae respectfully submits that the procedures set forth in the Municipal Annexation Act of 1965 fail to raise any substantial or justiciable federal issues and the complaint should be summarily dismissed. But, if the provisions of the Act are reviewed on their merits, the provisions as applied to Plaintiffs are consistent with federal due process and equal protection requirements. Finally, if the Court is disposed to consider the judicial review procedures on their merits, those provisions are reasonable, consistent with the legislative power of the state over municipal annexations, and do not impair any constitutional rights of Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief have been served upon all parties of record by first class mail, postage prepaid, addressed to George Louis Creamer, Creamer & Creamer, 928 Equitable Building, Denver, Colorado 80202, Fred M. Winner, Capitol Life Center, Denver, Colorado 80202, and to F. T. Henry and William T. Eckhart, 501 Mining Exchange Building, Colorado Springs, Colorado 80902, this 5th day of December, 1969.