COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
Colorado Court of Appeals Case No. 16CA1316 Opinion by Judge Webb; Lichtenstein, J., concurs; Berger, J., dissents	
Denver District Court, Case No. 15CV31175 Honorable A. Bruce Jones, Judge	
Petitioners: DEPARTMENT OF REVENUE OF THE STATE OF COLORADO; and MICHAEL HARTMAN, in his official capacity as the Executive Director of the Department of Revenue of the State of Colorado v. **Respondent:** ORACLE CORPORATION & SUBSIDIARIES	**▲ COURT USE ONLY ▲**
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BRIEF OF AMICUS CURIAE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY IN SUPPORT OF RESPONDENT ORACLE CORPORATION & SUBSIDIARIES

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

This brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4,295 words according to the word-counting feature of Microsoft Word, including all headings and footnotes, but excluding the title page, this Certificate of Compliance, the Table of Contents, the Table of Authorities, and the Certificate of Service.

I acknowledge that this 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/ *Alan Poe*

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IDENTITY OF AMICUS CURIAE

The Colorado Association of Commerce and Industry ("CACI") is a Colorado nonprofit membership corporation formed in 1965 through a merger of the Colorado State Chamber of Commerce and the Manufacturers' Association of Colorado. CACI's mission is to champion a healthy business climate in Colorado. http://cochamber.com/about-us/mission/ (last accessed October 19, 2018).

CACI's members consist of large and small businesses based in Colorado or doing business in Colorado, as well as several local chambers of commerce and a number of trade associations representing specific industries. CACI is a member of the U.S. Chamber of Commerce and the Colorado affiliate of the National Association of Manufacturers.

Oracle Corporation is a member of CACI. The cost of this brief was funded by special contributions from CACI members other than Oracle Corporation.

ISSUE ADDRESSED BY AMICUS CURIAE

The issue CACI addresses in this brief is whether a C corporation that has no property and no payroll is an "includable C corporation" under section 39-22-303(12)(c), C.R.S. ("Section 303(12)(c)"). CACI agrees with the Court of Appeals and Respondent that a C corporation that has no property and no payroll is not an "includable C corporation" under Section 303(12)(c).

INTEREST OF AMICUS CURIAE

As stated above, CACI's mission is to champion a healthy business climate in Colorado. An important part of a healthy business climate is a fair and predictable tax system. This includes tax laws that are clear and are fairly and consistently applied in accordance with their language.

In furtherance of the goal of clear tax laws, representatives of CACI testified before legislative committees that considered House Bill No. 1010, 1985 Colo. Sess. Laws ch. 309 ("HB 1010"), which added Section 303(12)(c) to the Colorado corporation income tax statute. In 2008 and 2015, in furtherance of the goal that tax laws be fairly and consistently applied in accordance with their language, CACI submitted comments on proposals by the Colorado Department of Revenue first to change and then to withdraw the regulation issued under Section 303(12)(c).

In CACI's view, the arguments put forth by the Petitioners (collectively, the "Department"), and by the amici curiae supporting the Department, run counter to the goals of tax laws that are clear and are fairly and consistently applied in accordance with their language. As described below, the Department's application of Section 303(12)(c) is contrary to unambiguous statutory language, clear expression of legislative intent, and the Department's own long-standing regulation.

A decision by this Court upholding the Department's application of Section 303(12)(c) would have repercussions beyond the specific technical issue involved in this case. Such a decision would undercut the constitutional grant to the General Assembly of exclusive authority over the tax policy of the state. It would also erode the confidence of all taxpayers (not just businesses) that Colorado's tax laws are fairly and consistently applied in accordance with their language and in conformity with controlling regulations.

For these reasons, CACI joins Respondent in asking the Court to affirm the unanimous conclusion of the Court of Appeals that a C corporation that has no property and no payroll is not an "includable C corporation" under Section 303(12)(c).

ARGUMENT

I. THE UNAMBIGUOUS STATUTORY LANGUAGE MANDATES THAT A C CORPORATION THAT HAS NO PROPERTY AND NO PAYROLL IS NOT AN "INCLUDABLE C CORPORATION" UNDER SECTION 303(12)(C).

In 1985, the General Assembly added Section 303(12)(c) to the Colorado corporation income tax statute, in essentially the same form as it exists today.[1]

[1] In 1992, references to "corporations" in Section 303(12)(c) and other sections of the Colorado corporation income tax statute were changed to "C corporations," in connection with the addition of special provisions applicable to S corporations. House Bill No. 92-1263, 1992 Colo. Sess. Laws ch. 330, § 8, p. 2272. In the 2005 and subsequent versions of the Colorado Revised Statutes, the word "includible" in Section 303(12)(c) and elsewhere was changed to "includable." For consistency,

HB 1010, § 1, at p. 1276. HB 1010 was the legislative response to significant controversy and confusion arising from the Department's use of "combined reporting" to determine the Colorado income tax liability of multistate and multinational corporations doing business in Colorado.

In general, under combined reporting, the income of a corporation that is taxable in a state is combined with the income of specified other entities that are affiliated with the taxable corporation. The combined income is then apportioned to the state by applying factors based on the sales, payroll, and/or property of all of the combined entities, and the taxable corporation pays state income tax on the apportioned amount. See *Hewlett-Packard Co. v. State*, 749 P.2d 400, 401 (Colo. 1988) for a brief description of combined reporting, which that opinion refers to as the "combined accounting" method or "unitary apportionment."

This Court sanctioned the Department's use of combined reporting for Colorado income tax purposes in certain circumstances in *Joslin Dry Goods Co. v. Dolan*, 615 P.2d 16 (Colo. 1980). However, prior to 1985, the Colorado corporation income tax statute provided no guidance as to limits on the use of combined reporting, or on the key question of which entities were properly includable in a combined report. Left with only the Court's statement of a

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the term in the current version of the Colorado Revised Statutes ("includable C corporation") will be used in this brief, except in direct quotes of materials that use a different term.

legislative intent to "tax all the income that Colorado can constitutionally tax" (*Joslin*, 615 P.2d at 19, quoting *Coors Porcelain Co. v. State*, 517 P.2d 838, 840 (Colo. 1973)), the Department aggressively applied combined reporting in its audits of multistate and multinational corporations that were taxable in Colorado.

The Department's aggressive application of combined reporting generated substantial criticism. While much of the criticism was directed at the Department's use of so-called "world-wide combined reporting," the absence of objective criteria for determining which entities were properly includable in combined reports also drew complaints from taxpayers and business groups, including CACI. *See, e.g.*, Testimony by Roger Tallich, Chairman of CACI's Task Force on Unitary Taxation, on HB 1010 Before the House Finance Committee, January 16, 1985 (Appendix B to Opening Brief, at p. 45, lines 6-10) ("The courts when they do decide an affiliate group is not unitary do not give you a clear reason why. All we are asking for in this area is clear rules with which to play the ballgame."); Statement by Senator Strickland on HB 1010 Before the Senate Finance Committee, April 2, 1985 (Appendix B to Opening Brief, at p. 203, lines 2-7) ("one of the reasons why we're having to address this issue with House Bill 1010 is because of the flexibility or the discretion used in the Department of Revenue in applying the unitary tax. 1010 is specific in dealing with what is necessary for the application of that tax."); Statement by Senator Strickland on HB 1010 During

Senate Floor Debate on Second Reading, April 30, 1985 (Appendix D to Opening Brief, at p. 3, lines 8-10) ("House Bill 1010 comes as a result of a great deal of controversy and confusion surrounding the issue of unitary tax.").

In HB 1010 the General Assembly addressed the expressed concerns about world-wide combined reporting and about the absence of objective criteria for determining which entities were includable in combined reports. The result is a statutorily-defined combined reporting structure that is unique to Colorado.

The statutory structure created by the General Assembly includes a prohibition against the Department including in a combined report certain C corporations conducting business outside the United States (section 39-22-303(8), C.R.S.), rules regarding the treatment of foreign source income not otherwise excluded from the combined report (section 39-22-303(10), C.R.S.), and specific criteria for determining when members of affiliated groups of C corporations may be included in combined reports (section 39-22-303(11), C.R.S.). The General Assembly also provided a specific definition of which entities are eligible to be included in a combined report. The use of a combined report is permitted only in the case of "an affiliated group of C corporations," which is defined as one or more chains of "includable C corporations" connected through stock ownership in specified ways with a common parent C corporation that is an "includable C corporation." Section 39-22-303(11)(a) & (12)(a), C.R.S.

The General Assembly defined the term "includable C corporation" as "any C corporation which has ***more than*** twenty percent of the C corporation's property and payroll as determined by factoring pursuant to section 24-60-1301, C.R.S., assigned to locations inside the United States." Section 303(12)(c) (emphasis added). Thus, in HB 1010, the General Assembly replaced ill-defined constitutional standards with specific rules and definitions to be applied in determining which entities may be included in a combined report.

With respect to the issue of whether a C corporation that has no property and no payroll is an "includable C corporation" under Section 303(12)(c), the Court of Appeals concluded that the language of HB 1010 is unambiguous, a conclusion with which CACI agrees. *Oracle Corporation and Subsidiaries v. Department of Revenue*, 2017 COA 152, ¶¶ 23, 31. If a C corporation has no property and no payroll, "more than twenty percent of the C corporation's property and payroll" means "more than twenty percent of zero," which is "more than zero." By definition, a C corporation that has no property and no payroll cannot have more than zero property and payroll assigned to locations in the United States.[2] Therefore, a C corporation that has no property and no payroll cannot be an

[2] The Department contends that application of the factors in section 24-60-1301, C.R.S., to a C corporation that has no property and no payroll produces an "indeterminate" or "undefined" number. Opening Brief, p. 35. "Indeterminate" or "undefined," however, is not "more than twenty percent," so even under the Department's analysis a C corporation that has no property and no payroll does not meet the plain statutory definition of an "includable C corporation."

"includable C corporation" under Section 303(12)(c), which means it cannot be part of an "affiliated group" under Section 39-22-303(12)(a), C.R.S., which in turn means it cannot be included in a combined report under Section 39-22-303(11)(a), C.R.S. *Oracle*, ¶ 17. The Court of Appeals correctly applied the plain statutory language in holding that a C corporation with no property and no payroll is not an "includable C corporation."

The arguments of the Department and the amici curiae who support it are not based on the statutory language enacted by the General Assembly, but rather are based on what the Department and the amici curiae believe the General Assembly ***should have*** enacted as Colorado's combined reporting structure. However, Colorado tax law is written by the General Assembly, not by the Department, not by a multistate tax agency, and certainly not by out-of-state academics. *Cohen v. State Department of Revenue*, 593 P.2d 957, 961 (Colo. 1979) ("It is elemental that only the General Assembly may originate taxes. Colo. Const., Art. III and Art. V, section 31. Clearly an administrative body has no power to impose a new tax."). If the Department and its supporting amici curiae believe the laws regarding combined reporting enacted by the General Assembly constitute bad tax policy, they should address their concerns through the legislative process – an approach

the Department has eschewed for more than three decades.[3] They should not be asking this Court to rewrite the laws to conform to what they believe is better tax policy than what the General Assembly actually adopted.

The Department seeks to avoid the result mandated by the plain language of Section 303(12)(c) by conflating that provision with section 39-22-303(8), C.R.S., to create what the Department calls a "water's edge exemption." Opening Brief, pp. 8-9, 25-29. HB 1010 did not create an exemption from Colorado income tax. The exclusion of a particular C corporation from a combined report may result in either an increase or a decrease in Colorado income tax, as compared to the result if the C corporation is included in the combined report. *See Hewlett-Packard*, 749 P.2d at 401-02.

Nor did HB 1010 create a simple "water's edge" combined reporting structure. Under HB 1010, a C corporation based outside the United States may be included in a combined report (if, for example, more than twenty percent of the C corporation's property and payroll is assigned to locations inside the United States), and a C corporation doing business solely in the United States may be excluded from a combined report (if, for example, the C corporation does not meet

[3] Thirty-three regular sessions of the General Assembly have taken place since HB 1010 was enacted in 1985. To CACI's knowledge, the Department has never sought a legislative fix for what it claims is an unintended consequence of HB 1010.

three of six statutory tests described in section 39-22-303(11)(a), C.R.S.). The Department's description of HB 1010 as a "water's edge exemption" is inaccurate.

In addition, the Department's conflation of Section 303(12)(c) and section 39-22-303(8), C.R.S., ignores the difference in the statutory language between the two provisions and requires the addition of language to Section 303(12)(c) that does not exist. Section 39-22-303(8), C.R.S., applies only to a C corporation "which conducts business outside the United States." The General Assembly could have included that limitation in Section 303(12)(c), but it did not. *Oracle*, ¶¶ 32-38. In order to accept the Department's "two sides of the same coin" argument, the Court would need to add the words "which conducts business outside the United States" to Section 303(12)(c). The Court cannot add to a tax statute language that the General Assembly did not enact. *Boulder County Board of Commissioners v. HealthSouth Corporation*, 246 P.3d 948, 954 (Colo. 2011) ("We will not read into a statute language that does not exist.").

The Department and the amici curiae supporting it appear to assume that the General Assembly's sole purpose in enacting HB 1010 was to eliminate the world-wide aspects of combined reporting, and that the General Assembly did so by adopting a "typical" domestic combined reporting structure. The statutory language of HB 1010 and its legislative history prove those assumptions to be false. The General Assembly intended to – and did – establish specific and unique

rules about which entities are included in a combined report, including the rule that no C corporation can be included in a combined report unless more than twenty percent of its property and payroll are assigned to locations within the United States. The General Assembly did not adopt a uniform law, did not copy another state's combined reporting structure, and did not create what the Department or its supporting amici might consider to be the "right" combined reporting structure.

The General Assembly's language should be applied as written, not as the Department or the amici curiae believe it should have been written. Otherwise, Colorado's tax laws will be whatever an unelected, unaccountable agency thinks they ought to be, and the goal of having clear and predictable tax laws will not be met.

II. THE GENERAL ASSEMBLY CLEARLY EXPRESSED ITS INTENT THAT A C CORPORATION THAT HAS NO PROPERTY AND NO PAYROLL IS NOT AN "INCLUDABLE C CORPORATION."

As described above, the unambiguous statutory language of Section 303(12)(c) mandates the result that a C corporation that has no property and no payroll is not an "includable C corporation." In 1991 the General Assembly confirmed that this is the intended result of the statutory language, by refusing to extend a regulation to the contrary.

In 1990 the Department issued a regulation under HB 1010 providing that "[a] corporation without property and payroll, which functions through the use of

personnel services and/or property of an includible corporation, shall also be considered an includible corporation." Regulation 39-22-303.12(c), as promulgated at 13 Colorado Register 6 (1990). Less than six months later, the Office of Legislative Legal Services advised the General Assembly's Committee on Legal Services that the regulation "conflict[s] with the definition of 'includible corporations' as set forth in section 39-22-303(12)(c), C.R.S." Memorandum to Committee on Legal Services from Sharon L. Eubanks, Office of Legislative Legal Services, dated November 7, 1990, at p. 2. The Memorandum stated that corporations with no property or personnel "do not satisfy the statutory requirements of having more than twenty percent of its (*sic*) property and payroll located in the United States," and that the regulation therefore modified the statutory definition of includable corporations set forth in Section 303(12)(c). *Id.*

The General Assembly agreed with the analysis of the Office of Legislative Legal Services and allowed the 1990 version of Regulation 39-22-303.12(c) to expire, effective June 1, 1991, because it was "adopted without authority of the state constitution or statute." House Bill No. 91-1257, 1991 Colo. Sess. Laws, ch. 25, §§ 1(1)(o)(I)(A) & 1(5), pp. 143, 146-47, 149. Thus, just six years after the enactment of HB 1010, the General Assembly declared that the position the Department now asks this Court to adopt was not authorized by the statutory

language. That statutory language has not materially changed in the intervening twenty-seven years.

Neither the Department nor its supporting amici curiae mention the General Assembly's rejection of the 1990 version of Regulation 39-22-303.12(c). Instead, they ask this Court to adopt the position that the General Assembly expressly rejected. In essence, they ask this Court to substitute its judgment for that of the General Assembly in an area (establishing state tax policy) over which the Colorado Constitution grants plenary power to the General Assembly. Colo. Const., art. III & art. V,§ 31; *Cohen*, 593 P.2d at 961.

III. THE DEPARTMENT'S POSITION DIRECTLY CONTRAVENES ITS OWN REGULATION.

The year after the General Assembly permitted the 1990 version of Regulation 39-22-303.12(c) to expire, the Department published the following guidance under Section 303(12)(c):

> In those situations where a corporation has no property or payroll of its own (e.g. Foreign Sales Corporations), but which functions through the use of the personnel services and/or property of an includible corporation, it is the Department's position that such corporations are not to be included in a combined report.

Revenue Bulletin 92-10 (Appendix 1 to this brief). As "official policy positions of the Department," Revenue Bulletins "are considered binding in nature, and therefore may be changed by the Department ***only on a prospective basis*** by

superceding (*sic*) Bulletins, changes in the statutes, or court cases" (emphasis added). Revenue Bulletin 92-10 remained in effect without change until February 2018, when the Department rescinded all prior Revenue Bulletins. *See* Revenue Bulletin 18-01.

Two years after issuing Revenue Bulletin 92-10, the Department replaced the expired 1990 version of Regulation 39-22-303.12(c) with the following:

> **Regulation 39-22-303.12(c). Corporations without property and payroll factors.**
>
> C.R.S. 39-22-303(12)(c) provides that only those corporations whose property and payroll factors are assigned twenty percent or more to locations inside the United States may be included in a combined report. Since corporations that have no property or payroll factors of their own cannot have twenty percent or more of their factors assigned to locations in the United States, such corporations, by definition, cannot be included in a combined report.

1 CCR 201-2. This regulation has been in effect continuously since 1994 and remains in effect today.[4] To the best of CACI's knowledge, at no time in the nearly quarter of a century since the 1994 version of Regulation 39-22-303.12(c)

[4] The Department refers to a notice placed on its website in January 2016 advising taxpayers not to rely on Regulation 39-22-303.12(c) because, the Department claimed in the notice, it was intended to apply to foreign sales corporations. Opening Brief, p. 31 n.11. The notice was issued long after the tax years at issue here. It was not promulgated in accordance with the rule-making requirements of section 24-4-103, C.R.S., and therefore cannot amend or rescind the regulation. Section 24-4-102(16), C.R.S. (including amendment or repeal of a rule as rule-making). The notice is essentially a nullity.

was promulgated has the General Assembly acted to repeal the regulation or to let it expire.

In 2008, the Department proposed to amend the 1994 version of Regulation 39-22-303.12(c). CACI submitted comments opposing the proposal, for the same reasons as those set forth in this brief. Appendix 2 to this brief. The Department withdrew its proposal prior to a hearing. 1 CCR 201-2, eDocket Tracking No. 2008-01033, Proposed Rule at pp. 32-33, Additional Information at p. 4.[5] In 2009 the Department proposed the same changes but did not adopt them. 1 CCR 201-2, eDocket Tracking No. 2009-00765.

In 2015, the Department proposed to withdraw the 1994 version of Regulation 39-22-303.12(c). CACI again submitted comments opposing the proposal, for the same reasons as those set forth in this brief. Appendix 3 to this brief. The Department did not withdraw the regulation. 1 CCR 201-2, eDocket Tracking No. 2015-00480.

Thus, on three separate occasions in the past ten years, the Department evaluated the language of the 1994 version of Regulation 39-22-303.12(c). On each occasion the Department decided to leave intact, without restriction or limitation, the conclusion that a C corporation that has no property and no payroll cannot have more than twenty percent of its factors assigned to locations in the

[5] The eDocket Tracking documents can be accessed on the Colorado Secretary of State's website, https://www.sos.state.co.us/CCR/eDocketCriteria.do.

United States and therefore "***by definition***, cannot be included in a combined report" (emphasis added).

The Department argues, without citing any authority, that Regulation 39-22-303.12(c) should be interpreted to apply only to C corporations "with predominantly foreign operations," a phrase not found in Section 303(12)(c) or Regulation 39-22-303.12(c), and for which the Department offers no definition. Opening Brief, pp. 30-32. Regulation 39-22-303.12(c) is not limited to a vague and undefined group of C corporations, but by its express terms applies to "corporations that have no property or payroll factors of their own." The Department's attempt to limit the scope of Regulation 39-22-303.12(c) is inconsistent with the plain language of the regulation and should be rejected. *See Rags Over the Arkansas River, Inc. v. Colorado Parks and Wildlife Board*, 2015 COA 11M, ¶ 27 (courts "may reject an agency's interpretation of its regulations if the language of the regulation compels a different meaning. . . . Indeed, where a regulation plainly requires a different interpretation, '[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.' ").

Moreover, the rationale upon which the 1994 version of Regulation 39-22-303.12(c) is based is not limited to C corporations "with predominantly foreign operations," but applies to all C corporations. The rationale is expressly stated in

the regulation itself: "corporations that have no property or payroll factors of their own ***cannot*** have twenty percent or more of their factors assigned to locations in the United States" (emphasis added). Since that is a statutory requirement to be an "includable C corporation" under Section 303(12)(c), such corporations "***by definition, cannot*** be included in a combined report" (emphasis added).

The Department's position, that a C corporation that has no property and no payroll is an "includable C corporation" under Section 303(12)(c), is directly contrary to Regulation 39-22-303.12(c). An agency, however, is bound by its own regulations. *Rags Over the Arkansas River*, 2015 COA 11M at ¶ 25 ("It is in fact 'axiomatic that an agency must adhere to its own regulations.' *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 P.2d 533, 536 (D.C. Cir. 1986). This ensures reliability and fairness.").

Taxpayers should be able to rely on regulations, not only in planning and structuring future activities and transactions, but also in order to have confidence in their understanding of the tax implications of their completed activities and transactions. Unpredictable or "indeterminate" tax consequences discourage businesses from investing in Colorado, which was the main reason why the General Assembly adopted HB 1010. By taking a position directly contrary to its own regulation, the Department undermines the General Assembly's intent to

provide clear rules for combined reporting and destroys the predictability and consistency of application that are essential elements of a fair tax system.

Uncertainty in the reliability of regulations also creates distrust among taxpayers. If the Department can choose to disregard its own regulations, taxpayers can justifiably assume that the Department will apply regulations as written when doing so furthers its agenda, but will disregard regulations when they do not further its then-current agenda. This creates a perception, if not a reality, that Colorado's tax policy is not established by the constitutionally empowered and politically accountable General Assembly, but rather by an unelected and unaccountable administrative agency.

The Department's attempt to disregard its own regulation was rejected unanimously by both panels of the Court of Appeals and both District Court judges that considered the issue (the dissenting Court of Appeals judge in this case having relied on a different statutory provision). *Oracle*, ¶¶ 24-26, 71 n.1; *Agilent Technologies, Inc. v. Department of Revenue*, 2017 COA 137, ¶¶ 20-21 (currently on appeal to this Court in Case No. 17SC840); Order, *Oracle Corporation and Subsidiaries v. Department of Revenue*, Denver District Court Case No. 2015CV31175 (2016), pp. 5-7; Order re Defendants' Motion for Summary Judgment and Plaintiff's Cross-Motion, *Agilent Technologies, Inc. v. Department of Revenue*, Denver District Court Case No. 2014CV393 (2016), pp. 8-10. In order

to preserve the integrity of Colorado's tax system and the constitutional authority of the General Assembly to enact tax laws, CACI asks this Court to reject the Department's effort to disregard its own regulation.

CONCLUSION

CACI supports Respondent's request that the Court affirm the ruling of the Court of Appeals that a C corporation that has no property and no payroll is not an "includable C corporation" under Section 303(12)(c).

Dated: October 22, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 22, 2018, copies of this **BRIEF OF AMICUS CURIAE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY IN SUPPORT OF RESPONDENT** were served by Colorado Courts E-Filing on:

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