

COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
District Court, Jefferson County, Colorado Hon. Chantel E. Contiguglia Case No. 2022CV30412	
Plaintiff-Appellee: METROPCS CALIFORNIA, LLC v. Defendant-Appellant: CITY OF LAKEWOOD, COLORADO	
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BRIEF OF AMICUS CURIAE COLORADO CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFF-APPELLEE	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(a)(2)-(3), C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 29(d) because it contains 3,696 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28(a)(2)-(3), C.A.R. 29 and C.A.R. 32.

s/ Ted W. Friedman

Ted W. Friedman

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INTEREST OF AMICUS CURIAE

The Colorado Chamber of Commerce (“Colorado Chamber”) is a private, non-profit, member-funded organization. Its mission is to champion a healthy business climate in Colorado. The four key objectives of that mission include: (1) maintaining and improving the cost of doing business; (2) advocating for a pro-business state government; (3) increasing the quantity of educated, skilled workers; and (4) strengthening Colorado’s critical infrastructure (roads, water, telecommunications, and energy). The Colorado Chamber is the only business association that works to improve the business climate for all sizes of business from a statewide, multi-industry perspective.

This case concerns the interpretation of the Colorado Taxpayer’s Bill of Rights (“TABOR”) Amendment, which mandates “voter approval in advance” for certain enumerated state and local tax measures, including “any new tax.” Colo. Const. art X, § 20(4)(a). Here, the district court correctly found that two ordinances adopted by Lakewood in 1996 and 2015, which enlarged the City’s

telephone utility business and occupation (“B&O”) tax¹, violated TABOR by creating a “new tax” without voter approval in advance.

The Colorado Chamber’s members depend on the predictable application of tax laws to plan their business operations in both the short and long terms. As such, *amicus* has a compelling interest in the continued interpretation of TABOR in a manner that is fair, transparent, and reflective of the people’s will.

INTRODUCTION & SUMMARY OF ARGUMENT

TABOR requires “voter approval in advance” for any “new tax.” Colo. Const., art. X, § 20(4)(a). Nonetheless, the City did not obtain voter approval for either Ordinance. The issue before the Court is whether the Tax enlargements contained in the Ordinances may be excused from TABOR’s voter approval mandate.

This brief does not repeat the analysis contained in the Opening-Answer Brief of Plaintiff-Appellee, MetroPCS California, LLC. Rather, *amicus* provides further context regarding the purpose and function of TABOR and why the district

¹ *Amicus* refers to the two ordinances individually as the “1996 Ordinance” and the “2015 Ordinance,” and collectively as the “Ordinances,” and refers to Lakewood’s telephone utility B&O tax, as the “Tax.”

court correctly determined that the Ordinances failed to comply with TABOR's advance voter approval requirement.

As discussed more fully below, TABOR provides a critical legal framework to ensure that the state's fiscal policies remain transparent, fair, and accountable. It does this through a multi-track approach, including by prohibiting taxing authorities from unilaterally adopting new taxes. TABOR provides a legal and often used process by which taxing authorities can overcome these limitations—and that process is through the ballot box.

Contrary to assertions by Lakewood and supporting *amici*, requiring a vote for new taxes does not create unreasonable restrictions on the government's ability to respond to fiscal needs, but rather ensures that any increase in government funds is carefully scrutinized and directly sanctioned by the electorate, promoting transparency, accountability, and alignment with the community's economic priorities, in line with the letter and spirit of the TABOR.

ARGUMENT

I. Lakewood Was Required to Obtain Voter Approval Prior to Adopting the Ordinances and Failed to Do So.

Lakewood was required by the Colorado Constitution to comply with the TABOR election requirements prior to implementing the Ordinances. Because the Ordinances were “new taxes,” within the meaning of TABOR, they should have

been approved by the Lakewood electorate prior to their adoption. Lakewood failed to even seek approval, which was a violation of law.

A. Rewriting the Plain Language of a Taxing Statute to Expand the Scope of a Tax Creates a “New Tax” Subject to a TABOR Vote

The extent to which Lakewood altered the scope of the Tax renders each of the Ordinances a “new tax” under TABOR. Prior to adoption of the 1996 Ordinance, the Tax applied to a narrowly defined subset of telecommunications businesses, i.e., utility companies that maintained a telephone exchange and lines in Lakewood for the purpose of supplying local exchange telephone service to the inhabitants of Lakewood. Lakewood’s adoption of the Ordinances eliminated these distinctions, expanding the Tax to each and every telephone business regardless of its registration status (*i.e.*, whether or not a utility), infrastructure, or telecommunications protocol employed. Due to the scale of the revisions and vast expansion of the imposition of the Tax, the Ordinances amount to a “new tax.”

Lakewood and its supporting *amici* argue that Lakewood’s adoption of the Ordinances was not a rewrite of the Tax but merely implemented “clarifying updates” that did not amount to a “new tax.” However, the Ordinances expanded the scope of the tax far beyond its original terms. By rewriting the Tax, Lakewood did not merely clarify the meaning of the statute or remove doubt relating to certain activities that may have otherwise been exempt from the Tax. The Tax was

clear and unambiguous on its face. Instead, the Ordinances expanded the City's taxing authority by imposing the Tax on new taxpayers and activities that were not previously subject to the Tax.

Introducing new taxpayers or taxable activities, which the Ordinances clearly did, can significantly alter taxpayer expectations. Such changes impose additional responsibilities on businesses, often requiring them to adapt swiftly to new compliance requirements. The introduction of new taxable activities may also create uncertainty as businesses must now interpret and apply new regulations to their operations. This disruption in the established tax landscape can lead to confusion, increased administrative costs, and potentially, inadvertent non-compliance. TABOR ameliorates these issues by putting taxpayers on notice and generating greater public discourse around the scope and impact of the new tax.

Lakewood's amendments are clearly distinguishable from revisions that clarify a generally worded or broadly applicable tax statute to address its application to new products or services. Provided its adoption meets the requirements of TABOR, an ordinance granting broader taxing authority provides flexibility and adaptability in the face of evolving market conditions and technological advancements. For example, most sales tax codes, including Lakewood's, impose the tax on "tangible personal property," a term broad enough

to include forms of tangible personal property that come into existence well after the code's enactment. By employing broad terminology in such a manner, lawmakers can ensure that emerging business models and innovations are covered under intended tax frameworks. *See AT&T Commc'ns of Mountain States v. Dep't of Revenue*, 778 P.2d 677, 681 (Colo. 1989) (“[A] statute written in general terms applies to subjects or activities which come into existence after adoption of the statute, including those which could not have been anticipated when the statute was enacted.”). Ultimately, if Lakewood had originally imposed the Tax broadly – *e.g.*, on the business of providing telephone service, without restriction – Lakewood later could have clarified that the Tax applies to technologies such as cellular phone service. That is not what happened here. Lakewood did not write any pre-TABOR version of the Tax in general terms.

This Court has instructed that a “new tax” under the meaning in TABOR is a legislative action that results in “creation, not alteration” and does not include revisions to a tax regime that results in “an incidental and de minimis revenue increase.” *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101, 106 (Colo. 2018). Lakewood and its *amici* argue that Lakewood's rewrite of the tax base is akin to the adjustments to tax exemptions, adding some exemptions and removing other exemptions, that were the subject of *TABOR Foundation*. They further argue that

finding that Lakewood's Ordinances constitute a "new tax" is inconsistent with this Court's determination in *TABOR Foundation*.

The Ordinances rewrote the authorizing language of the tax and drastically increased its scope, while *TABOR Foundation* addressed changes to tax exemptions. It should not be ignored that this Court has distinguished between the interpretation of a statute or ordinance that authorizes a tax as opposed to language that provides for a deduction or an exemption from a tax. *BP Am. Prod. Co. v. Colo. Dep't of Revenue*, 369 P.3d 281, 285 (Colo. 2016). Deductions and exemptions are considered "a matter of legislative grace" and are not applicable unless clearly provided in the language of the statute. *Id.* Authorizing statutes, on the other hand, are interpreted in favor of the taxpayer. *Id.* Applying these principles, the Court would be justified in distinguishing between the incidental and de minimis changes resulting from adjustments to tax exemptions as are present in *TABOR Foundation* and a rewrite of the language imposing the tax as is the case with each of the Ordinances.

The district court correctly held that the Ordinances did not result in a tax increase incidental to a broader tax-neutral purpose. Instead, the district court found that the Ordinances added to the scope of taxable activity and that Lakewood

collected, attempted to collect, or claimed entitlement to collect, monies that it would not have been entitled to under the Tax prior to TABOR.

Further, any claim that compliance with a new state statute provided a tax-neutral purpose ignores the very language in the statute in question. In the words of C.R.S § 38-5.5-107(2)(c), the General Assembly expressly required that political subdivisions amend local taxes on telecommunications providers and services, such as the Tax, in accordance with TABOR's voter-approval requirement. If voter approval could not be obtained, the statute provides that the local tax should be vacated. Supporting *amici* read past the statute and characterize this requirement to obtain voter approval or vacate as the "district court's suggestion." Brief of *Amicus Curiae* Colorado Dep't of Revenue at 11. To the contrary, it is a legislative command.

Businesses must be able to rely upon a statute's plain language when it comes to defining the scope of a tax. In order for businesses to accurately comply with and appropriately prepare for their tax obligations, tax statutes must clearly delineate the scope of activity to which the tax applies. On the other hand, ambiguity in taxing statutes can lead to unintended consequences for taxpayers, including non-compliance and costly disputes. Such uncertainty in the application of business taxes often disproportionately affects small business owners. Ensuring

that taxing statutes are written clearly and enlarged only through proper legal procedures is crucial for fostering long-term economic stability in Colorado. For this reason, this Court has held that “all doubts regarding interpretation of language in a tax statute,” especially a statutory provision authorizing the imposition of a tax, must be read “in favor of the taxpayer.” *BP Am. Prod. Co.*, 369 P.3d at 285; *see also City of Boulder v. Leanin’ Tree, Inc.*, 72 P.3d 361, 367 (Colo. 2003).

The district court correctly read the law and determined that the Ordinances were a “new tax” under TABOR.

B. TABOR Cannot Be Read to Render the Distinction between TABOR Section 4(a) and Section 7(b) Moot.

TABOR Section 4(a) requires that each “new tax” be subject to a vote by the constituents of the taxing jurisdiction. This requirement is separate from the requirement that tax revenue exceeding the amount that is permitted under TABOR Section 7 must be returned to the taxpayers, and may only be retained by the taxing authority after a vote has approved such actions. Lakewood’s 2018 ordinance that permitted it to retain excess revenues collected from 2017 through 2025 did not override the vote required by TABOR Section 4(a) in order to approve the “new taxes” enacted by the Ordinances.

Section 4(a) of TABOR mandates that districts must obtain voter approval in advance for “any new tax.” This provision ensures that taxpayers have a direct say

in any fiscal measures that could increase their financial burden. By requiring voter consent, Section 4(a) upholds the principles of transparency and accountability, thus preventing policymakers from unilaterally altering tax schemes to the detriment of citizens' finances. This democratic mechanism empowers voters to scrutinize and approve significant tax changes, thereby fostering a collaborative approach to fiscal decision-making and promoting public trust in governmental financial practices. This requirement also encourages a thorough public discourse on the necessity and impact of proposed tax changes, ensuring that any adjustments reflect the electorate's priorities and contribute to the state's long-term economic stability.

This Court has held that, when interpreting a constitution or statute, “a construction rendering [language] redundant, or superfluous, should be avoided.” *Benefield v. Colo. Republican Party*, 329 P.3d 262, 267 (Colo. 2014). Thus, this Court must recognize that TABOR Section 4(a) requires that each “new tax” be subject to a vote by the constituents of the taxing jurisdiction. This requirement is separate from any requirement based on whether the tax revenue kept by the taxing authority exceeds the amount that is permitted under TABOR Section 7.

Further, Section 4(a) requires that such vote be conducted in advance of the “new tax.” This Court has held that “[i]n construing a constitutional provision like

TABOR, our goal is to determine and effectuate the will of the people in adopting the measure.” *In re Interrogatory on House Bill 21-1164 Submitted by the Colo. Gen. Assembly*, 487 P.3d 636, 642 (Colo. 2021) (citing *Bolt v. Arapahoe Cnty. Sch. Dist.*, 898 P.2d 525, 532 (Colo. 1995)). To accomplish this purpose, this Court gives the provision’s terms “their ordinary and plain meanings” and “endeavor[s] to avoid constructions that would produce unreasonable or absurd results.” *Id.* at 642-43. Clearly, the intent is that voters be given the right to weigh in on new taxes *before* they are implemented.

C. C.R.S § 38-5.5-107(2)(c) Mandated that Lakewood Obtain Voter Approval Prior to Adopting Changes to the Tax

Lakewood has argued that the purpose of the 1996 Ordinance was to bring the Tax into compliance with C.R.S. § 38-5.5-107(2)(a), which provides that “[a]ny tax, fee, or charge imposed by a political subdivision shall be competitively neutral among telecommunications providers.” C.R.S. § 38-5.5-107(2)(a) (1996). However, C.R.S. § 38-5.5-107(2)(c) further provides that if an existing tax does not meet this standard, then the governing body of the political subdivision should follow the requirements of TABOR and provide for an election to be held prior to extending the tax to all providers of comparable telecommunications or broadband services. If the extension of the tax is not approved by the voters at such election,

then the existing tax shall no longer apply to the providers that had been subject to the tax immediately before the election.

C.R.S. § 38-5.5-107(2)(c) mandated that Lakewood follow the TABOR election requirements before adopting the Ordinances. The fact that the General Assembly expressly required local governing bodies to comply with TABOR removed any pretense that the enlargement of any telecommunications tax for purposes of compliance with C.R.S. § 38-5.5-107(2)(a) would excuse compliance with the TABOR Section 4(a) vote requirement. It did not, and thus Lakewood's noncompliance cannot rely on this alternative motive.

II. Policy Arguments Put Forth by Defendants and Supporting *Amici* Are Not Supported By the History of TABOR.

A. TABOR's Vote Requirement is Not an Overly Burdensome Impediment on Taxing Authorities.

Defendant and its supporting *amici* argue that requiring a vote for new taxes imposes unreasonable restrictions on the government's ability to respond to fiscal needs. This is simply not true. As stated above, localities are free to enact broad based taxes *with voter approval*. TABOR votes are regularly conducted and most often approved. CML tracks municipal election results on matters related to the Taxpayer's Bill of Rights. See <https://www.cml.org/home/topics-key-issues/tabor-election-results>. From 1993 to 2024, Colorado's municipalities conducted 1,324

TABOR votes on tax legislation questions alone (averaging more than 42 per year), with 819 tax measures passing and 505 failing, a 61.9% approval rate. *Id.*, Election Results, Tax Questions, p. 34. There is nothing extraordinarily difficult or unusual about complying with TABOR's voter approval requirement. State and local governments do not require more leeway.

Lakewood's proposal from 2005 to increase its sales and use tax rate from 2% to 3% was approved by the voters. *Id.*, p. 19. Furthermore, in November 2024, Lakewood voters approved removing the TABOR cap on local government spending pursuant to a vote conducted under TABOR Section 7(b). *Id.* By successfully garnering voter approval to increase its sales and use tax rate and to lift the TABOR cap indefinitely, the local government demonstrated that, when effectively communicated and justified, significant fiscal measures do indeed receive the backing of the electorate.

Each of these serves as a compelling example that the requirement to hold a public vote on tax questions is not unduly restrictive of the government's ability to obtain necessary funding for its services. Requiring a public vote on new taxes does not create an insurmountable barrier to fiscal adaptability. Instead, it shows that with robust public discourse, comprehensive information dissemination, and a clear articulation of the benefits, voters can make informed decisions that address

the dynamic fiscal needs of their community. Rather than impeding government operations, such process ensures a transparent and participatory approach to fiscal policy.

Successful votes in Lakewood and elsewhere indicate that citizens are not only capable of understanding the complexities of government funding needs but are also prepared to endorse necessary measures when these are presented transparently and align with their priorities. This participatory approach ensures that taxes are not only fair and reflective of the electorate's will but also carry the legitimacy and trust that come from direct public endorsement.

B. The Legislative Intent at the Time of Enactment is Too Subjective a Standard for Determining De Minimis Effect.

Lakewood's supporting *amici* argue that TABOR requires the Court to evaluate the potential revenue impact of a tax before a law is passed and ignore the aftermath. To support their proposition, they cite to TABOR language that voter approval must be obtained in advance of the "new tax" being adopted. This reasoning conflates the standard and timing for voter approval with the objective outcome of whether a "new tax" has only de minimis impact.

The impact of a taxing statute cannot be fully assessed at the time of or immediately after its enactment because the true effects unfold over time as the jurisdiction begins to enforce the tax and businesses and individuals begin to

comply. It is a misconception to assume that the determination of whether a new tax must comply with TABOR should be based solely on the expectations or beliefs of legislators prior to its enactment. Legislators' anticipations are inherently subject to personal biases, incomplete information, and the unpredictable nature of economic and social contexts. The legislative record may not adequately establish expectations with regard to the impact of the tax. And where legislative records are robust with statements of intent, the court would still need to weigh whether such statements are pretense, and an underlying intent was the true purpose of the new tax. Consequently, relying solely on a legislature's pre-enactment perspectives would undermine the objective analysis required for ensuring compliance with TABOR's provisions. The true measure of compliance should be grounded in the actual impact and characteristics of the change to the tax.

An accurate assessment of TABOR compliance necessitates evaluating the tax in practice, considering its tangible outcomes and alignment with the principles of voter consent and fiscal responsibility. This approach ensures that the spirit of TABOR is upheld, and taxpayers' interests are genuinely protected.

Further, the nature of the amendment to the law must be considered, i.e., whether the change produces offsetting impacts (as was the case in *TABOR*

Foundation) or whether it only increases the scope of business activities subject to the tax (as is the case with the Ordinances). Incorporating new taxpayers or transactions into the existing scope of the tax base without removing anything from the current scope will only result in a net increase of tax revenue. By expanding the tax base to include a new, previously untaxed parties or activities, governments are guaranteed to generate additional income. This is what Lakewood did when it adopted the Ordinances by expanding the scope of services, which increased the number of taxpayers subject to the tax. Changes such as these should be subjected to greater scrutiny and their impact should be measured for a reasonable period beyond the adoption of the tax. This ensures that a TABOR vote determination is rooted in objective, empirical data rather than mere speculation.

C. Taxing Authorities Can Overcome Constraints by Drafting Clear Tax Laws.

Taxing authorities draft their taxing statutes and ordinances to address the economic activity or actor that they intend to be subject to the tax. Sometimes they may cast a broad net, such as with sales tax, which generally taxes any sale of tangible personal property. In other instances, they impose taxes on specific industries or specific activities. The structural aspects of the tax, such as its base, rate, and scope, as well as the targeted taxpayers and taxable activities collectively determine its potential revenue but can also establish a broader economic impact

and changes in market behavior. Taxing authorities are capable of defining the scope of taxable activities to clearly target the desired class of products and services.

Taxing authorities are also capable of anticipating future developments and, to the extent desired, incorporating broad language that can adapt to change. And if existing tax laws are found to be inadequate, taxing authorities are capable of amending the tax to accommodate their needs, provided they follow the established legal procedures to do so. In Colorado, our Constitution not only requires a transparent legislative process, where proposals are scrutinized and debated, but also the final say of voters in the decision-making process when new taxes are enacted.

By involving voters, TABOR encourages comprehensive public discourse and consideration of the implications of proposed tax changes. This democratic engagement leads to well-informed decisions that reflect the collective will and best interests of the community, rather than hasty or unilateral actions that may not take into account the diverse needs of Colorado's population.

CONCLUSION

For the foregoing reasons, the Colorado Chamber respectfully urges the Court to answer the question presented of whether the Ordinances violated

TABOR by creating a “new tax” without voter approval in advance in the affirmative.

DATED this 23rd day of December, 2024.

Respectfully submitted,

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CERIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 23rd day of December, 2024, filed and served a true and complete copy of the foregoing BRIEF OF AMICUS CURIAE COLORADO CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFF-APPELLEE via the Colorado Courts E-Filing System on the following persons:

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