SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: November 8, 2018 7:12 PM FILING ID: C1A1901EC9A6E CASE NUMBER: 2017SC368
Respondent/Cross-Petitioner: **NATIONAL FEDERATION OF INDEPENDENT BUSINESS,** v. **Petitioners/Cross-Respondents:** **WAYNE W. WILLIAMS**, in his official capacity as Colorado Secretary of State; **COLORADO DEPARTMENT OF STATE; and THE STATE OF COLORADO.**	
On Certiorari to the Colorado Court of Appeals Case No. 15CA2017 Opinion by Booras, J., Roman and Fox, JJ., concur.	**▲COURT USE ONLY▲**
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AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, GOLDWATER INSTITUTE, TABOR FOUNDATION, AND COLORADO UNION OF TAXPAYERS FOUNDATION IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

CERTIFICATE OF COMPLIANCE

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

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,987 words (does not exceed 4,750 words).

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

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

s/ JAMES M. MANLEY
James M. Manley

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Amici Curiae public interest groups respectfully submit this brief in support of Respondent/Cross-Petitioner National Federation of Independent Business (NFIB).

IDENTITIES AND INTERESTS OF AMICI CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) is the oldest public interest legal foundation of its kind, fighting for the principles of limited government and private property rights in state and federal courts throughout the nation. To that end, PLF has frequently participated in cases concerning how to distinguish taxes from fees. *See, e.g., Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open Space Auth.*, 187 P.3d 37 (Cal. 2008); *May v. McNally*, 55 P.3d 768 (Ariz. 2002). Therefore, PLF is keenly interested in this appeal, which concerns the same issue under the Colorado Constitution.

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefings. Through its Scharf–Norton Center for Constitutional Litigation, GI

litigates cases and files amicus briefs when its or its clients' objectives are directly implicated. Among GI's principal goals is defending taxpayers from unconstitutional and unjustified charges, and GI has litigated and appeared as amicus curiae in federal and state courts in cases involving constitutional and statutory limits on taxes. *See, e.g., Vangilder v. Pinal County* (No. TX2017-000663, AZ Tax Court, pending); *Biggs v. Betlach*, 243 Ariz. 256 (2017). GI believes its legal and policy expertise will benefit this Court in its consideration of this case.

TABOR Foundation is an advocacy organization that was created with the express goal of defending the voter enacted Colorado Taxpayer Bill of Rights. The mission of the TABOR Foundation is to develop and distribute educational materials, documenting compliance with the Taxpayer's Bill of Rights, and to provide a clearinghouse for information and analysis about the effectiveness, structure, and importance of TABOR and other tax-limitation measures. Accordingly, TABOR Foundation has a great interest in the resolution of this case.

Colorado Union of Taxpayers Foundation (CUT) is a nonprofit, public-interest, membership organization with its principal place of business in Denver, Colorado. CUT was formed to educate the public as to the dangers of excessive taxation, regulation, and government spending. Among the specific goals of CUT is to protect the Taxpayer's Bill of Rights. CUT members spent considerable time and money generating support for the passage of TABOR. CUT is also dedicated to enforcing TABOR, as evidenced by its lawsuit challenging the City of Aspen's grocery bag tax in Colorado state court. *Colorado Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, 418 P.3d 506.

ARGUMENT

I. This Court Should Not Require NFIB to Prove That Section 24-21-104 Is Unconstitutional "Beyond a Reasonable Doubt"

In its opening brief, the Secretary of State argues that this Court must uphold the constitutionality of Section 24-21-104 unless NFIB can demonstrate that it is unconstitutional "beyond a reasonable doubt." This Court should not place such a heavy burden on NFIB in this case for two reasons. First, the stated justification for the "beyond a reasonable doubt" standard is that it is presumed that the General

Assembly legislates with constitutional limitations in mind. That justification, however, cannot apply where the statute was passed prior to the constitutional limitation at issue. Second, even if the standard were to apply in this case, this Court should reconsider whether it should continue to apply the standard. The standard is archaic and undefined and requires the judiciary to abdicate its responsibility to interpret the law. Furthermore, any respect this Court has for a co-equal branch of the government cannot displace the responsibility the judiciary has to respect the will of the people in passing TABOR.

A. Because the General Assembly adopted Section 24-21-104 prior to TABOR, this Court cannot presume that the Legislature intended for it to comply with TABOR.

Courts around the country began adopting some version of the "beyond a reasonable doubt" standard of review in the late 1800s. Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. Pa. J. Const. L. 97, 108 (2013). This Court first articulated a presumption of constitutionality in 1880 and first stated a version of the "beyond a reasonable doubt" standard in 1884. Laura J. Gibson, *Beyond A Reasonable Doubt:*

Colorado's Standard for Reviewing A Statute's Constitutionality, 23 Colo. Law. 835, 835 (Apr. 1994); *People ex rel. Tucker v. Rucker*, 5 Colo. 455, 458–59 (1880); *Alexander v. People*, 7 Colo. 155, 159, 2 P. 894, 896 (1884).

The most well-known articulation of the standard of review comes from an 1893 law review article by Professor James Thayer. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal. L. Rev. 519, 522 (2012); *see* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). There are several justifications for the standard, but the primary justifications are respect for a co-equal branch of government and that the legislature itself is aware of its constitutional limitations when it legislates. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal. L. Rev. at 524–25; *Rucker*, 5 Colo. at 458.

These justifications are limited when, as here, the legislature enacted the statute at issue prior to enactment of the constitutional provision at issue. It may be true that the General Assembly considers its constitutional limitations prior to passing legislation. But if the

legislature is acting within a completely different set of limitations when it passed the legislation, there is no justification for a court presuming that the legislature would or could have passed legislation under later adopted constitutional provisions. Thus, this Court should not apply a presumption of constitutionality in this case.

B. The "beyond a reasonable doubt" standard of review is outdated and should be abandoned, especially in cases involving TABOR.

Even if this Court would ordinarily apply the "beyond a reasonable doubt" standard of review in a case involving a statute passed prior to the constitutional provision at issue, this Court should not do so here. The "beyond a reasonable doubt" standard has been called into question and "[t]oday, few scholars, and no [U.S. Supreme Court] Justices, favor an explicitly Thayerian approach." Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. Pa. J. Const. L. at 113. Indeed, in recent years, this Court has granted petitions for certiorari requesting this Court to reconsider the standard, but has ultimately declined to decide the issue. *Colorado Union of Taxpayers Found. v. City of Aspen,* 2018 CO 36, ¶ 14,

418 P.3d 506, 511; *TABOR Found. v. Reg'l Transportation Dist.,* 2018 CO 29, ¶ 15, 416 P.3d 101, 104; *see also See* Daniel D. Domenico, *The Constitutional Feedback Loop: Why No State Institution Typically Resolves Whether A Law Is Constitutional and What, If Anything, Should Be Done About It,* 89 Denv. U. L. Rev. 161, 167–68 (2011) (stating that there is dispute within this Court about how, and whether, to apply the standard).[1]

Scholars and courts are right to question the "beyond a reasonable doubt" standard. The standard conflicts with the judiciary's duty "to say what the law is" and to declare that a law "repugnant to the [C]onstitution, is void." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Bd. of Cnty. Comm'rs v. Vail Assoc., Inc.*, 19 P.3d 1263, 1272 (Colo. 2001). The formulation of the standard second-guesses this Court's judgment, discounting the traditional understanding of a judge's role in reviewing

[1] Parties in non-TABOR cases have also questioned the standard of review. *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 2015 CO 50, ¶ 26 n.14, 351 P.3d 461, 470 n.14., *cert. granted, judgment vacated sub nom. Doyle v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2324 (2017), and *cert. granted, judgment vacated sub nom. Colorado State Bd. of Educ. v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2325 (2017), and *cert. granted, judgment vacated*, *Douglas Cty. School Dist. v. Taxpayers for Public Educ.,* 137 S. Ct. 2327 (2017).

the constitutionality of laws. Robert Satter & Shelley Geballe, *Litigation Under the Connecticut Constitution—Developing a Sound Jurisprudence*, 15 Conn. L. Rev. 57, 70 (1982) ("Legal issues are resolved by research, analysis, reflection, and judgment …. Once a court resolves what the law is, there ceases to be doubt."). Ultimately, the "beyond a reasonable doubt" standard, if faithfully applied, requires courts to frequently validate unconstitutional laws. *Island Cty. v. State*, 955 P.2d 377, 391 (Wash. 1998) (Sanders, J., concurring) ("For, quite literally, the maxim requires us to hold either a statute is proved unconstitutional beyond a reasonable doubt, or we must uphold it, which literally requires us to opine: Either a statute is proved unconstitutional beyond a reasonable doubt, or we will hold it is constitutional even if it really isn't.").

The standard is particularly unsuitable in TABOR cases. Although this Court respects the actions of another branch of government, this Court is also obligated to respect the will of the people when they adopt constitutional amendments. "When construing a constitutional amendment courts must ascertain and give effect to the

intent of the electorate adopting the amendment." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). By deferring to the legislature in questions of constitutional interpretation, this Court wrongly places the will of the legislature above the will of the people, and the text of the Constitution. Satter & Geballe, *Litigation Under the Connecticut Constitution—Developing a Sound Jurisprudence*, 15 Conn. L. Rev. at 70 ("Creating more than a presumption of constitutionality for legislative or executive action places the reaches of those branches almost above the constitution ….").

In passing TABOR, the electorate was clear that they did not want courts to presumptively affirm legislation related to taxing and spending. TABOR expressly provides that "[i]ts preferred interpretation shall reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). In *Barber v. Ritter*, this Court attempted to reconcile the standard of review expressed in TABOR with the "beyond a reasonable doubt" standard. 196 P.3d 238, 247 (Colo. 2008). This Court stated that TABOR's standard "applies only where the text of the Amendment supports multiple interpretations equally." *Id.* at 247–48.

Even assuming that the latter statement is true, the *Barber* standard is different than the "beyond a reasonable doubt" standard of review. Under the "beyond a reasonable doubt" standard of review, where the text of an amendment supports multiple interpretations equally, this Court would presume the statute constitutional. But TABOR commands the opposite: this Court is required to interpret TABOR's "tax" limitations broadly, to reasonably restrain the growth of government. Colo. Const. art. X, § 20(1).

As demonstrated below, the text of TABOR and the nature of the business charges demonstrate that the Business Charges are taxes. This Court should not avoid that conclusion by falling back on an archaic and outdated standard of review that conflicts with the proper role of the judiciary and the text of the Colorado Constitution.

II. Whether Called "Regulatory Fees" or "User Fees," the Business Charges Are Taxes Because They Fund Expenses Unrelated to Business Regulation

The Secretary and his Amici discuss a supposed distinction between "regulatory fees" and "user fees" at some length, Secretary's Br. at 38–47, Denver's Br. at 6–13, but this Court has recently made

clear that any supposed distinction is irrelevant here. Whatever the label, a charge is a "tax" as that word is used in TABOR if it does not bear "a reasonable relationship to the direct or indirect costs to the government of providing the service or regulating the activity" that necessitates the charge. *Colorado Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 23, 418 P.3d at 512. The undisputed primary use of the Business Charges is to pay for functions and activities unrelated to business services and regulations—almost 90% of the functions funded by the Charges are unrelated to businesses. The Charges are therefore taxes.

The conclusion that the Business Charges are taxes is supported by this Court's TABOR precedent, its pre-TABOR precedent, and the decisions of other courts.

A. This Court recently reaffirmed that TABOR requires the amount of a regulatory fee be reasonably related to the regulation of the payees' activities.

This Court made clear in *Colorado Union of Taxpayers Found. v. City of Aspen* that a charge is a tax if it lacks a reasonable nexus between the amount charged and the service or regulatory activities

necessitating the charge. 2018 CO 36, ¶ 23. Both the majority and the dissenters in *CUT* agreed that TABOR requires "a reasonable relationship to the direct or indirect costs to the government of providing the service or regulating the activity" that necessitates the charge. *Id.* (majority op.); *id.* ¶ 43 (Coats, J., dissenting) ("While categorization as a fee is clearly not dependent upon a precise one-to-one correspondence between the charge and the benefit provided, and while protecting the public from any deleterious effects of exercising the privilege or benefit is legitimately viewed as an indirect cost of providing the benefit itself, revenue may not be raised for other regulatory purposes beneficial to the public by setting the charge to a payer higher than necessary to offset the cost of the benefit provided him, and still be characterized as a 'fee.'"); *id.* ¶ 63 (Hood, J., dissenting) ("[a] charge is a fee, not a tax, when the express language of the charge's enabling legislation contemplates that its fundamental purpose is to defray the cost of services provided to the payer.").

In other words, everyone agreed that the amount of Aspen's bag fee needed to be reasonably related to the regulation of paper bags and

the waste they generate. Thus, the dispute among the Justices in *CUT* was about how generously to credit the assumption that "Aspen set the charge [for a paper bag] at $0.20 because it believed this was the amount it cost the city to recycle a bag." *Id.* ¶ 32; *cf. id.* ¶ 44 (Coast, J., dissenting) (The "undisputed evidence [showed] that the amount of the exaction was not set by simply analyzing the cost of collection, disposal, and recycling of the bags ….").[2]

No such dispute arises here, because the stipulated facts reveal that the cost of providing business services and regulating businesses is 90% less than the amount collected by the Business Charges. *Nat'l Fed'n of Indep. Bus. v. Williams*, No. 2014CV34803, Order at 2 (Denver Dist. Ct., Nov. 3, 2015). In fiscal year 2013–14, the Business & Licensing Division commanded the lowest share of the Department's budget—only 10.9%. *Id.* Other functions of the Department unrelated to business (and thus not reasonably related to the Business Charges) captured the majority of the revenue generated by the Business

[2] Justice Coats was correct. *See CUT v. Aspen*, Plaintiff's MSJ, PSOF ¶ 14–15; Cantrell Dep. at 31 ("Q. Was any similar study conducted with respect to the City of Aspen and its costs for the lifecycle of a paper bag? A. No.").

Charges—23.2% went to the Elections Division, 41.4% to the Information Technology Division. *Id.* at 2. This Court would have reached a very different conclusion in *CUT* if Aspen had stipulated that the actual cost of recycling a bag was only $0.02 (90% of $0.20) or if most of the paper bag charges actually covered expenses unrelated to waste reduction. Applying the *CUT* test here, this Court should unanimously conclude that the Business Charges are taxes because they do not bear "a reasonable relationship to the direct or indirect costs to the government of providing the service or regulating the activity" that necessitates the charge. 2018 CO 36, ¶ 23.

B. Prior to the enactment of TABOR, the amount of a regulatory fee was required to be reasonably related to the regulation of the payees' activities.

This Court's pre-TABOR precedent leads to the same conclusion that the Business Charges are taxes subject to TABOR's voting requirements. Amici Denver and the Colorado Municipal League attempt to re-characterize some of this Court's pre-TABOR precedents as suggesting a different conclusion because the older cases supposedly dealt with user fees rather than regulatory fees. Denver's Br. at 8

(citing *Zelinger v. City & Cty. of Denver*, 724 P.2d 1356, 1358 (Colo. 1986), and *Loup-Miller Constr. Co. v. City & Cty. of Denver*, 676 P.2d 1170, 1175 (Colo. 1984)). Amici are wrong on both the premise and the conclusion.

In *CUT*, this Court preemptively extinguished Amici's attempt to re-characterize these as "user fee" cases: "In each of these cases, the charge was part of a comprehensive regulatory regime, the charge was intended to defray, in part, the costs of that regulatory work, and there was a reasonable relationship between the overall cost of the service and the charge." 2018 CO 36, ¶ 24. The Secretary's Amici are attempting to ignore not only this Court's ruling in *CUT* as discussed above, but also this Court's characterization of its precedents.

But even if pre-TABOR cases like *Loup-Miller* and *Zelinger* could be recast as "user fee" cases, the Secretary's Amici must admit that such a re-characterization cannot change the outcome here. As their own authorities make clear, even if a fee is labeled regulatory, the "funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation." 16 McQuillin Mun. Corp. § 44:24 (3d ed.).

That relationship between regulatory fees and regulatory costs can account for both direct and indirect costs, but it must be related to the particular regulation at issue. For example, building permit fees must "approximate the overall costs of operating the building department," which issues building permits. *Bainbridge, Inc. v. Bd. of Cty. Comm'rs of Cty. of Douglas*, 964 P.2d 575, 577 (Colo. App. 1998). If building permit fees were not used to fund the permitting process, but instead to fund the building department's operation of a library (or management of elections), the fees would become "unlawful taxes that violate the Colorado constitution" because the connection between the charge and the regulation would be severed. *Id.*; *see also Barber v. Ritter*, 196 P.3d at 250 n.15. ("Although Petitioners do not raise this issue, we note that a statutory charge may be labeled a fee, but in effect be a tax, if the statutory rate of the charge is unreasonably in excess of the cost of services the charge is designed to defray. The rate of fees imposed on users must bear some reasonable relationship to the cost of services provided."); *American Trucking Ass'ns., Inc. v. O'Neill*, 522 F. Supp. 49, 53–54 (D. Conn. 1981) ("tax," not "fee," where truck registration fee

raised $10 million to cover regulatory costs of $90,000, a "gross disproportion").

Here, it is undisputed that the Business Charges do not bear a reasonable relationship to services or regulations related to businesses. The Charges fund the vast majority of the Secretary's functions, including activities that have nothing to do with servicing and regulating businesses such as coordination of statewide elections, directly funding some local elections, and regulating charitable organizations. All of these services are funded by the Business Charges, but none are related to the regulation of businesses. The problem is that almost 90% of the Business Charges fund services and regulations unrelated to businesses, not that they are labeled "regulatory" or "user" charges.

C. Many courts have enforced the requirement that the amount of a regulatory fee must be reasonably related to the regulation of the payees' activities.

This Court's consistent conclusion over the years that fees must bear a reasonable relationship to services or regulations directed toward those charged is also supported by the decisions of other jurisdictions.

Most notably, the U.S. Supreme Court has concluded that regulatory fees associated with building permits must have "a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605–06 (2013) (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)). Regulatory fees that fail that "nexus" and "rough proportionality" test raise takings and unconstitutional conditions problems. *Id.*; *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the constitution"); *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 592–593 (1926) (invalidating business license regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege").

The Constitution allows the government to "choose whether and how a permit applicant is required to mitigate the impacts of a proposed

development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz*, 570 U.S. at 606. Although it is "beyond dispute that [t]axes and user fees ... are not 'takings,' … teasing out the difference between taxes and takings is more difficult in theory than in practice"—in large part because constitutional limitations on the power to levy taxes "greatly circumscribe[]" the risk of confiscatory taxes. *Koontz*, 570 U.S. at 615–17 (quote omitted). Treating the Business Charges as fees exempt from Colorado's most serious taxpayer protections elevates the risk that the Charges will be misassessed for unconstitutional purposes.

Likewise, the *Sinclair Paint* decision relied upon by the Secretary contemplates actual standards—including a requirement that regulatory fees must be justified on a pro rata basis based on "a reasonable relationship to [the] adverse effects" the fee is intended to regulate. *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 870, 937 P.2d 1350, 1351 (1997); Secretary's Br. at 38. The fees in *Sinclair Paint* were allowable regulatory fees that covered the State's

cost to enforce an environmental regime and to remediate environmental harm caused by the payees; however, the fees were permissible only because there was a direct connection to the activity of the payee. By contrast, the Secretary seems to assume that regulatory fees may justify exactions intended to cover costs for *any* regulatory program, regardless of whether there is a direct nexus to the activities of the payee.

Moreover, numerous courts have followed the First Circuit's decision in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992), which noted that courts, in distinguishing a regulatory fee from a tax, "have tended ... to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation." 967 F.2d at 685. Regulatory fees must be "used for the regulation or benefit of the parties upon whom the assessment is imposed." *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) (applying

San Juan Cellular); *see also Hawaii Insurers Council v. Lingle*, 120 Haw. 51, 66, 201 P.3d 564, 579 (2008) (collecting cases).

CONCLUSION

This Court and others have said time and again that a "fee" must bear a reasonable relationship to services or regulations directed toward those charged. The Business Charges fund services and regulations far in excess of those directed to the fee-paying businesses. This Court's application of TABOR and the nature of the Business Charges demonstrate that the Charges are taxes. This Court should not avoid that conclusion by falling back on an archaic and outdated standard of review that conflicts with the proper role of the judiciary and the text of the Colorado Constitution.

Respectfully submitted this 8th day of November 2018.

s/ JAMES M. MANLEY
James M. Manley

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2018, a true and correct copy of the foregoing AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, GOLDWATER INSTITUTE, TABOR FOUNDATION, AND COLORADO UNION OF TAXPAYERS FOUNDATION IN SUPPORT OF RESPONDENT/CROSS-PETITIONER was served via Colorado Courts E-Filing upon following parties:

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