COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: July 10, 2023 9:24 AM FILING ID: FF4E92C2928C8 CASE NUMBER: 2023CA138
Appeal from District Court, Logan County, Colorado Hon. Robert C. James Case No. 2021 CV 030049	
James Aranci, *et al.*, *Plaintiffs-Appellants*, *v.* Lower South Platte Water Conservancy District, *et al.*, *Defendants-Appellees*.	**▲ COURT USE ONLY ▲** Case No.: 2023 CA 138
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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☑ It contains 5,301 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or 28(b).

☑ **For each issue raised by the appellant,** the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Tyler Martinez
Tyler Martinez (Atty. No. 42305)

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SUMMARY OF THE ARGUMENT

The briefing of this case makes clear that the arguments on appeal can be boiled down into a few points of contention: whether the Water District[1] is a mere ministerial functionary or quasi-legislative entity with discretion on how to fund itself; whether the Taxpayer Bill of Rights (TABOR)[2] will starve the Water District of funds; and whether the 1996 Referred Measure 4D, a "DeBrucing" ballot issue, inoculated the Water District from having to hold TABOR ratification votes to double its mill levy rate. Taking each in turn, the Water District's arguments in the Answer Brief fail.

First, the Water District argues that the Residents[3] waived a key contention of this case: whether and to what extent water districts have discretionary, quasi-legislative authority over their budgets. That is untrue, as it is a key component of the arguments between the parties on how to apply TABOR.

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[1] "Water District" means all Defendants-Appellees. Op. Br. at 1-2.
[2] Colo. Const. art. X, § 20.
[3] "Residents" means all Plaintiffs-Appellants. Op. Br. at 1.

Regarding the issue of the "ministerial" exception to TABOR, the Water District now claims that is merely a functionary that applies rates according to a statutory scheme. But in reality, as the Water Conservancy Act details at length, the Water District has *discretionary* authority in a range of options beyond mill levies. Because the statute has multiple options for funding—beyond Class A mill levies in C.R.S. § 37-45-122(2)(a)—*Huber v. Colorado Mining Association,* 264 P.3d 884 (Colo. 2011), does not apply to this case.

The key flaw in the lower court's opinion is that the District Court, ostensibly applying the ministerial exception, instead created a new exception: when the "varying budgetary needs" of the district mandate more money, then TABOR does not apply. CF, 295. That exception will swallow the whole of TABOR.

The Water District claims that requiring this tax rate increase to be submitted to the people will starve it for money. This is untrue: both TABOR and the Water Conservancy Act provide for multiple funding mechanisms. Notably, Residents here challenge only the Water District's

recent tax increase, not the prior 0.5 mill levy rate that persisted for decades.

The Water District again claims that Referred Measure 4D from 1996, a DeBrucing measure, also waived TABOR's tax rate limits. Answer Br. at 17-21. The District Court rejected this argument, holding instead that at all relevant times—TABOR's passage and Measure 4D's passage—the rate was set *as a range*. CF, 294-95. Rejecting the Water District's theory on Measure 4D was proper, but upholding the change based on a range of possible rates is error. Taking each in turn shows the Water District provided no support for either legal theory.

The District Court's decision was incorrect and warrants reversal. If a standard of "varying budgetary needs" is left in place, then the Water District can sidestep TABOR's ratification mandate at any time. All Residents ask is that if the Water District wishes to double what Residents pay in property taxes as it did here, that voters have a constitutional right to vote on it.

ARGUMENT

I. THE WATER DISTRICT'S TAX INCREASE WAS DISCRETIONARY AND SUBJECT TO TABOR.

A. The Residents' Arguments Were Preserved Below.

The Water District argues that the Residents waived the ability to dispute whether the Water District exercised discretionary, legislative-type decision making in setting its budget. In support of this, the Water District claims the court below held there was no evidence or argument in the record on this matter. Answer Br. at 10; *id.* at 24 (both citing to CF, 311). This is not true.

The Answer Brief's citation to CF 311 in both instances is unhelpful. That page of the record is the District Court granting a procedural motion for more time to the Water District to confer on a case management order. It is not subject to this appeal.

Without a quote or more information in the Answer Brief, it is difficult to discern what part of the order the Water District was relying upon. The best the Residents can surmise is a line from the District Court opinion that "[n]o evidence was presented to show the [Water] District's 2019 budget violated the requirements of section 37-45-122(2)(a)." CF,

294. If that is what the Water District means, it is a straw argument; Residents take issue with the tax rate being doubled without a vote of the people as required by TABOR, not that the rate exceeded the maximum rate allowed in C.R.S. § 37-45-122(2)(a). Residents therefore did not accede to the claim that this was a "ministerial" action, not one of discretionary choice in a quasi-legislative fashion. Op. Br. at 18-22.

In support of its waiver argument, the Water District cites *Madalena v. Zurich American Insurance Company*, 2023 COA 32, ¶ 50. Ans. Br. at 10; *id*. at 24. But that case–and that *exact* paragraph–actually stands for a broad understanding of what is preserve for appeal and therefore favors Residents. So long as a party "raises an argument to such a degree that the court has the opportunity to rule on it, that argument is preserved for appeal." *Madalena*, 2023 COA 32, ¶ 50. (quoting *Brown v. Am. Standard Ins. Co. of Wis.*, 2019 COA 11, ¶ 21). That is because "[n]o talismanic language is required to preserve an issue." *Id*. (quoting *Owens v. Dominguez*, 2017 COA 53, ¶ 21) (brackets supplied). If the lower court heard "the sum and substance of the argument [a party] now makes on appeal, [this Court] consider[s] that argument properly preserved for

appellate review." *Id.* (quoting *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010)) (brackets supplied).

Applied here, Residents properly preserved arguments for appeal. Residents asked whether *Huber* applies and whether the Water District had a range of legislative, discretionary options, thus defeating the "ministerial exception." *See*, *e.g.*, CF, 254 (Reply in Supp. of Mot. for Determination of a Question of Law and Response to Counter-Mot.) ("Here, though, LSPWCD's action to increase the mill levy was not 'nondiscretionary' or required according to a state adjustment formula, but entirely a discretionary action."). Residents also noted that *Huber* was in line with TABOR because there "was not any change *to the rate* for TABOR to be concerned with" in *Huber*—unlike the case at bar. CF, 254 (emphasis added). Residents argued that the *Huber* "involved no legislative or governmental act beyond that specified in the statute." CF, 254 (quoting *Huber*, 264 P.3d at 892).

And the District Court understood that the parties had raised this point and were in conflict on it, as evidence by the subsequent ruling on the applicability of *Huber*'s ministerial exception to TABOR. CF, 296

("[I]t is not an increase tax rate. See Huber, *supra*.") (underlining and italics in original, brackets supplied); *cf*. CF, 297 (holding the underlying statute created a mandatory formula, thus rejecting the Resident's interpretation of the law). The Residents believe this holding is error and argues against it in this appeal. Op. Br. at 18-22. That is hardly waiver.

B. The Water District has Many Options for Funding.

The Water District is not acting as a mere functionary, but instead can pay for its expenses from more than a dozen options—only one of which is raising the mill levy.

Only if something is routine, set by formula, and handled by an agency with no discretion can the ministerial exception to TABOR apply. If it can be formulated as a mathematical equation based on forces not controlled by the agency, it is ministerial.

Unlike the statute here, the coal mining severance tax statute in *Huber* had two tiers: a base rate and an adjustment for inflation. *See Huber*, 264 P.3d at 891. The statute there directed the Executive Director of the Department of Revenue to adjust the tax rate based on the Producer Price Index. *Id*. at 887 (discussing C.R.S. § 39-29-106). *Huber*'s

scheme was mathematical: take the base rate, add a percentage point for each 1.5 percent change in the Producer Price Index. C.R.S. § 39-29-106(5). The Producer Price Index, in turn, is calculated by the United States Bureau of Labor Statistics. *Id.*; U.S. Bureau of Labor Statistics, Producer Price Indexes.[4] Thus the *Huber* statutory formula left "no room for a discretionary decision." *Huber,* 264 P.3d at 891. The Colorado Supreme Court decision provided other examples of ministerial rate adjustments, *see Huber*, 264 P.3d at 893, including the unemployment insurance rate which is adjusted by criteria now codified at C.R.S. § 8-76-102.5.

The lack of discretion was dispositive in *Huber* because "the limitations of [TABOR] apply only to *discretionary* action taken by legislative bodies." *Id*. at 892 (emphasis added). The Department of Revenue had "no tax making or tax policy change authority" and had no choice to "modify the coal severance tax statutory mechanism or refuse to implement it." *Id*. Indeed, there was "no legislative or governmental act beyond that specified in the statute." *Id*.

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[4] *Available at*: https://www.bls.gov/ppi/.

Here, there is no statutory mandate to only use property taxes to support a water district. There is no formula to apply. Instead, water districts are quasi-legislative entities who select from numerous revenue options. They can contract with municipalities to sell their water to cities towns and counties. C.R.S. § 37-45-123 (statutory scheme for levy and collection under "Class B"). They can sell water rights to public corporations. C.R.S. § 37-45-124 (statutory scheme for levy and collection under "Class C"). They can sell *more* water rights to a customer in the district. C.R.S. § 37-45-125 (statutory scheme for levy and collection under "Class D"). They can contract water usage to "to public corporations, districts…, utilities, persons, mutual ditch companies, water users' associations, and other private corporations for irrigation, domestic, municipal, industrial, commercial, or other authorized uses." C.R.S. § 37-45-131 (sale of water by contract). They can sell water rights not already allotted to a landowner. C.R.S. § 37-45-118(1)(g).

Beyond the selling of water, water Districts may "take by appropriation, grant, purchase, bequest, devise, or lease, and to hold and enjoy water, waterworks, water rights, and sources of water supply, and

any and all real and personal property of any kind within or without the district necessary or convenient to the full exercise of its powers." C.R.S. § 37-45-118(1)(b)(I)(A). They can then sell land or other holdings. C.R.S. § 37-45-118(1)(b)(I)(B).

Water districts have other options too. They can borrow money via bonds or other means. C.R.S. § 37-45-118(1)(n). They can even build parks and charge fees to use the parks. C.R.S. § 37-45-118(1)(q)(III). About the only thing that a water district cannot do is build electric power plants or lines—unless it wants to sell the electricity at wholesale prices. C.R.S. § 37-45-118(2). They are not mere ministers.

For its conclusion, the District Court relied primarily on the use of the word "shall" in C.R.S. § 37-45-122(2)(a) as creating a formula for funding the water districts. CF, 291; *cf.* Answer Br. at 11 (relying on same). This reading was dispositive to the District Court: "Absent the mandatory language in section 37-45-122(2)(a), this Court would conclude that the increased mill levy from 2018 to 2019 by the District violated TABOR." CF, 293. But the that very same statutory subsection cognizes other options: "in each year, the board shall determine the

amount of money necessary to be raised by taxation, *taking into consideration other sources of revenue of the district*." C.R.S. § 37-45-122(2)(a).

A better reading of § 122(2)(a)'s "shall" provision is that the Water District can choose from among numerous means available to fund itself, but if it chooses to raise taxes, it should set a rate that does not create a surplus. *See id*. (requiring that the water district "raise the amount required by the district to supply funds for paying expenses"). Any other reading would create surplusage of other provisions and be at odds with actual experience under the statute.

The Water Conservancy Act as a whole also supports this reading. In the statutory scheme, C.R.S. § 37-45-122 applies to "Class A" mill levies. This Court has found that Class A is but one option for funding water districts: "the general assembly specifically intended to permit, *at the discretion of conservancy districts*, the use of the Class A mill levy as the sole method of revenue raising." *Pueblo W. Metro Water Dist. v. S.E. Colo. Water Cons. Dist.*, 721 P.2d 1220, 1222 (Colo. App. 1986) (emphasis

added); Op. Br. at 20 (discussing same). Discretion is not a mandate: the use of Class A is but one of *many* options available to water districts.

Indeed, the Water District acknowledges it exercises the discretion to raise revenue and is not limited to just ministerially setting a rate to pay for all expenses. Their Answer Brief at page 12 states that "[a] significant portion of the District's annual revenues is derived from real property taxes." "Significant portion" is not "all." This fact demonstrates that the state legislature has given them wider discretion and options for funding than the ministerial entities in *Huber*. That necessarily means the setting of their tax rates is discretionary, like a legislative decision.

This situation is analogous to the state legislature. The Colorado General Assembly has similar wide-ranging options to set its budget. Like C.R.S. § 37-45-122, the Assembly must look at its fiscal needs and set a tax rate: "The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." Colo. Const. art. X, § 2. Nonetheless, the State Assembly must go to the voters under TABOR to increase taxes. Colo. Const. art. X, § 20. Water districts are no different.

C. TABOR and the Water Conservancy Act have Emergency Relief Provisions.

Allowing Water District residents to vote on a recent tax increase would not starve the Water District of revenue, but both the District Court and the Water District expressed this concern. The District Court worried that "TABOR, while limiting in nature, should not be interpreted in such a way as to hinder basic government functions or cripple the government's ability to provide services." CF, 294 (quoting *In Re Interrogatory on House Bill 21-1164 Submitted by Colorado Gen. Assembly*, 2021 CO 34, ¶ 31). The Answer Brief asserted the same. Answer Br. at 14. Perhaps that is the basis of the District Court's "varying budgetary needs" test. CF, 295.

Even if this Court held the increase to be invalid, and a subsequent election voted down the mill levy increase, and the Water District had already spent the funds, several more things would have to go wrong before the Water District would be unable to provide basic functions. TABOR itself tries to instill good budgeting by mandating the creation of Emergency Reserves to help the government survive unanticipated

losses of revenue. Colo. Const. art. X, § 20(5). If the Water District follows subsection 5, many fears should be relieved.

But even if emergency reserves run out, TABOR does not mandate starvation of the government. TABOR has a release valve to keep the government out of default:

> When annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments, (4)(a) and (7) shall be suspended to provide for the deficiency.

Colo. Const. art. X, § 20(1). By suspending Section 20(4)(a), TABOR allows for the government to enact taxes and other revenue generating options in whatever amount necessary to pay the government's mandated obligations—all without a TABOR vote.

As for daily operations outside of mandatory spending, TABOR allows for emergency taxes to fill budgetary gaps. Colo. Const. art. X, § 20(6). While emergency *property* taxes are expressly disallowed, *id.*, other taxes may be generated on an as-needed basis. Colo. Const. art. X, § 20(6)(c). Any emergency taxes will need to be eventually refunded, but only after the emergency is over. Colo. Const. art. X, § 20(6)(b). All that

needs to happen to enact emergency taxes is a two-thirds vote of the Board of Directors of the Water District. Colo. Const. art. X, § 20(6)(a).

The Water Conservancy Act also provides procedures for seeking voter approval of rates all the way up to 3 mills—*six times* the rate the Water District was used to receiving. *See* C.R.S. § 37-45-122(4)(a). The Water District conceded such in this appeal. Answer Br. at 11 (citing C.R.S. § 37-45-122(4) generally). To use C.R.S. § 37-45-122(4), a majority of the Board can call for an election. C.R.S. § 37-45-122(4)(b). The Board then gives notice by publication "in a newspaper of general circulation, printed and published within the district" for "once a week for two consecutive weeks." C.R.S. § 37-45-122(4)(d). The election to approve this rate hike can be held separately from another election or concurrently. C.R.S. § 37-45-122(4)(b). If held as a separate election, the Board gets to set the date, polling place(s), and other details. C.R.S. § 37-45-122(4)(c). If the Board chooses the concurrent option, then details of time and polling locations are handled by the other election. C.R.S. § 37-45-122(4)(d). The Water District may find the voter approval element

inconvenient, but they cannot deny that it is a provision that can be utilized if Residents prevail.

Under both TABOR and the Water Conservancy Act, the Water District is protected from starvation. The safety valves of each allow for funds in a variety of ways to keep the government out of default and the lights on in the Water District headquarters. The fears of whether the Water District can pay its bills if it must cancel or refund a recent tax increase, therefore, should not be dispositive of the legality of doubling their mill levy without a public vote.

II. THERE WAS NO VOTER APPROVAL FOR THE WATER DISTRICT RATE INCREASE.

As it did before the District Court, the Water District spends much of its time arguing that Referred Measure 4D from 1996, a DeBrucing measure, also waived TABOR's rate increase ratification requirements. Answer Br. at 17-21; *cf.* Opening Br. at 23-24 (arguing plain language of Measure 4D as precluding voter-approval of future tax rate increases).

The District Court rejected this argument but held instead that at all relevant times—TABOR's passage and Measure 4D's passage—the rate was set *as a range*. CF, 294-95. The District Court was correct to

reject the Water District's theory on Measure 4D, but was incorrect to uphold the rate change as based on a range of possible rates. Taking each in turn shows there is no support for either theory.

A. The *Mesa County* Case Does Not Rescue the Water District's *Ultra Vires* Tax Rate Increase.

To explain why they believe Measure 4D authorized a mill levy increase when it plainly says that it does not authorize a mill levy increase, the Water District relies upon what was purportedly done in Mesa County's school districts, in the hopes of taking advantage of the Colorado Supreme Court's holding in *Mesa County Board of County Commissioners v. State,* 203 P.3d 519 (Colo. 2009). Answer Br. at 18 (comparing Water District measure with "[o]ne of the voter-approved measures interpreted in Mesa County").

There are several problems with this attempted bootstrapping. First, the Answer Brief cites a trial brief of a different set of advocates in another case—not the best evidence of what the voters of Mesa County authorized or what was approved by the Supreme Court. Second, this use of another's brief produces further error, because the Water District used the wrong language in its comparison. Third, on the merits, the language

is not "materially identical" as the Answer Brief suggests but has key differences that show no tax rate waiver took place here.

The claim is unsupported, as demonstrated by the Water District being unable to cite from the *Mesa County* decision nor that case's factual record, but instead quoting argument from the one of the party's briefs. *See*, *e.g.*, Answer Br. at 17 (Measure 4D … is materially identical to that already interpreted by the Colorado Supreme Court. CF, p. 153.") (underlining in original); Answer Br. at 18 (citing same).[5] Not only is this *not* a finding of fact of the District Court (the listing of which starts on CF, 289), it is not even from *this* case. It instead is part of the trial briefing in *Mesa County v. Colorado Department of Education*. CF 134 (start of brief). Another lawyer's advocacy in another case is not the best evidence of what the Colorado Supreme Court examined.

Even then, the Answer Brief's block quote is incorrect, citing instead an example of language Mesa County *didn't* use (to their benefit). The Answer Brief's block quote on page 18 starts: "Shall the Strasburg

[5] CF, 153 does not contain the block quoted material found in the Answer Brief. The Water District's quote actually comes from CF, 162—Exhibit 2 in briefing in the *Mesa County* litigation.

School District 31J…"[6] and the inference is that this was a standard language formulation for school district DeBrucing. The exhibit then lists which jurisdictions have used that language—and Mesa County's school districts are not among them. *See* CF, 162-63.[7]

Mesa County instead used different language with fewer restrictions. Going to the source material:

> REFERRED MEASURE 3A
>
> WITHOUT IMPOSING ANY NEW TAXES OR INCREASING TAX RATES, SHALL MESA COUNTY VALLEY SCHOOL DISTRICT NO. 51 BE AUTHORIZED TO RECEIVE, RETAIN AND SPEND NON-FEDERAL GRANTS AND ALL OTHER REVENUES COLLECTED FROM ANY SOURCE DURING THE 1998-1999 FISCAL YEAR AND EACH SUBSEQUENT FISCAL YEAR THEREAFTER AS VOTER-APPROVED REVENUE AND SPENDING CHANGES AND

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[6] Strasburg's School District is not even in Mesa County, but instead straddles Adams and Arapahoe Counties. Fiscal Services, Strasburg School District 31J, https://www.strasburg31j.com/departments-services/business-office ("Strasburg School District 31J is a small rural district… [that] services central Arapahoe and Adams counties.")

[7] *Mesa County* was not really about the scope of any particular DeBrucing measure on its own, but instead about a state statute for funding schools. *Mesa Cnty.*, 203 P.3d at 522 ("This is an appeal from a declaratory judgment order of the Denver District Court holding unconstitutional the amendments made by SB 07–199 to the local share of the funding formula of the School Finance Act."). The Supreme Court generally observed that most school districts had DeBruced, but did not detail the effect of the exact language of *each version* of the ballot issues.

AS EXCEPTIONS TO THE LIMITATION OTHERWISE APPLICABLE UNDER ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW?

Mesa Cnty. Clerk & Recorder, 1999 Coordinated Sample Ballot, Referred Measure 3A, Mesa County Valley School District No. 51 at 1 (attached to this filing for ease of the Court).[8] Mesa County Measure 3B was the same except for applying to the "PLATEAU VALLEY SCHOOL DISTRICT NUMBER 50." *Id.* at 2. It was *this* language that the Colorado Supreme Court examined in the *Mesa County* case, and should control. *See*, *e.g.*, *Mesa Cnty.*, 203 P.3d at 533.

The Water District's Answer Brief believes this is "materially identical" to its own DeBrucing measure. Answer Br. at 20. Not so.

The *Mesa County* Court itself described Mesa County measure as "a broadly worded, voter-approved waiver of revenue limits," *Mesa Cnty.*, 203 P.3d at 532, and "unlimited in scope," *id.* at 536. And while it referenced "all revenues from whatever sources, notwithstanding the limitations of article X, section 20," that language was designed "to

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[8] *Archived on the Mesa County Google Drive at*: https://drive.google.com/file/d/1CCaoxeb44O_rcksWzbyreMfTPOvkupzv/view?usp=drive_link.

capture increased property tax revenues resulting from increased property values." *Id*. That would only apply here if, for example, the Water District was suddenly flush with cash because of rising property values taxed at 0.5 mill. In that scenario, *Mesa County* and the language of Measure 4D would give the Water District cover to keep the excess revenue for its budget or other projects.

The Water District's Measure 4D was not so unlimited in scope. It has dollar limits in its text, asking voters to retain and expend only "AN ADDITIONAL SUM OF $13,025." CF 288, ¶ 6. And that money came from *specific* sources: "PROPERTY TAX REVENUES OF $5,982 AND OTHER REVENUES OF $7,043 COLLECTED IN 1995." CF 288, ¶ 6. The Water District's Measure 4D did use language similar to that found lacking in *Mesa County* when it referenced "ALL REVENUES FROM WHATEVER SOURCES, NOTWITHSTANDING THE LIMITATIONS OF ARTICLE X, SECTION 20." *Compare* CF 288, ¶ 6 *with Mesa Cnty.*, 203 P.3d at 533.

The Water District also had an *additional* provision after the TABOR reference: "PROVIDED, HOWEVER, THAT NO LOCAL TAX

RATE OR PROPERTY MILL LEVY SHALL BE INCREASED *AT ANY TIME* WITHOUT THE PRIOR APPROVAL OF THE VOTERS." CF, 289 ¶6 (emphasis added). That additional language, not found in the Colorado Supreme Court case, takes Measure 4D out of the realm of what was approved in *Mesa County* because only that county's ballot language was truly before the Colorado Supreme Court in the decision.[9]

As the Supreme Court commanded in *Mesa County*, "[r]eliance on the ballot language is especially important for these ballot issues because" TABOR "relies on voters to make important financial decisions." *Mesa Cnty.*, 203 P.3d at 534. If the voters of the Water District were told multiple times in multiple ways that the *rates* would not be increased if Measure 4D passed, then *Mesa County* or Measure 4D does not save the Water District's unconstitutional doubling of the mill levy in 2019.

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[9] Indeed, the Supreme Court recognized that different language would yield a different result, holding: "Only the Steamboat Springs (Routt County) School District passed a ballot measure that contained more limited language…. Therefore, for the remainder of this opinion we will be referring to the other 174 districts that conducted broadly worded waiver elections." *Mesa Cnty.* 203 P.3d at 525 n.3. The Water District's Measure 4D language is even more limited.

B. The Voters Never Approved a "Range" and the District Court Holding Otherwise was Error.

The District Court concluded that because the mill levy fell in the same *range* of *possible* rates at the time of the DeBrucing measure in 1996, that meant any increases within that range is not a new tax. CF, 296. That's not quite right, as the proper question is if it is a *tax increase*. The Opening Brief examined the case law of when a tax increase was approved by the voters, and why that is not the situation here. Op. Br. at 24-26.

Fundamentally, absent any constitutional or statutory limits, a range of possible tax rates imposed could be from zero to infinity. For example, during World War II, the top federal income tax rate was above 90%. *See*, *e.g.*, IRS, Instructions for Form 1040, U.S. Individual Income Tax Return 1944 at 4.[10] Excise taxes vary as well. *See*, *e.g.,* Colo. Dept. of Rev., Excise & Fuel Tax[11] (links to current state excise tax rates).

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[10] *Available at*: https://www.irs.gov/pub/irs-prior/i1040--1944.pdf. The current top federal income tax bracket is 37%. IRS, *IRS provides tax inflation adjustments for tax year 2023,* IR-2022-182 (Oct. 18, 2022) https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2023.

[11] https://tax.colorado.gov/excise-fuel-tax.

Property taxes can abstractly also have a wide range, from zero to infinity, and they are cumulative. *See*, *e.g.*, Jefferson Cnty., How Property Taxes are Calculated: Determination of Tax Rates[12] (giving hypothetical of 90.6390 mills); *cf*. Denver, Property Taxes FAQ: "How are my property taxes calculated?"[13] (Noting "Denver property is subject to 79.525 mills… but [i]f the property is located within a special district… additional taxes are levied upon the property.")

What matters for the case at bar is that state statutory law cabined the rates set by water districts to within a certain range, and then TABOR limited *future* rate increases to require a vote of the people. The Water District's mill levy rate was 0.5 mill at the moment TABOR was adopted. The rate at the time of the 1996 vote on Measure 4D was 0.5 mill. The voters never approved anything other than 0.5 mill.

Not only was there no voter approval, the last ballot issue on the matter expressly disclaimed there would be a tax increase from what was

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[12] https://www.jeffco.us/822/Determination-of-Tax-Rates.

[13] https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Department-of-Finance/Our-Divisions/Treasury/Property-Taxes.

then a 0.5 mill levy. *See* Section II(A), *supra*; CF, 289 ¶6 ("*PROVIDED, HOWEVER*, THAT NO LOCAL TAX RATE OR PROPERTY MILL LEVY SHALL BE INCREASED *AT ANY TIME* WITHOUT THE PRIOR APPROVAL OF THE VOTERS.") (emphasis added).

The Water District argues that "PROVIDED, HOWEVER" serves as mere "acknowledgement… of the operative tax laws." Answer Br. at 23. In other words, rather than serving its plain meaning as a limitation on the scope of Measure 4D, the phrase "PROVIDED, HOWEVER" has been transformed, according to the Water District, into a catchall of prior statutory law. *Id*.

The Court should reject this attempt to create ambiguity out of something that is very clear. Courts should "giv[e] words and phrases their commonly accepted and understood meanings." *See*, *e.g.*, *OXY USA Inc. v. Mesa Cnty. Bd. of Comm'rs*, 2017 CO 104, ¶ 16. Even if the Court looks to a dictionary, it should be "to ascertain its plain and ordinary meaning." *Capital One, N.A. v. Colo. Dep't of Rev.*, 2022 COA 16, ¶ 17. And this Court should "not read a statute to create an exception that the plain language does not suggest, warrant, or mandate." *Bruce v. City of*

Colorado Springs, 129 P.3d 988, 993 (Colo. 2006) (quotation marks and citation omitted).

"Provided, however"[14] is a phrase of two words. Black's Law Dictionary defines "provided" as (1) "on the condition or understanding (that)" (2) "[e]xcept (that)" and (3) "and." *Provided*, Black's Law Dictionary (10th ed. 2009). "However" is not defined in Black's Law Dictionary. But another commonly used dictionary defines "however" as "(1) [b]y whatever manner or means," or (2) "[t]o whatever degree or extent." *However*, The American Heritage Dictionary of the English Language (1980). As a conjunction, "however" means "[n]evertheless; yet." *Id*. An archaic meaning of the word is "[a]lthough; notwithstanding that." *Id*.

Combined, the dictionary terms for "provided, however" mean an exception to a prior statement. And it is that ordinary meaning for "provided, however," that is used in Colorado law: it is a phrase of limitation of scope. *See*, *e.g.*, *Gold Coin Min. & Leasing Co. v. Gourlay*, 65

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[14] The Water District cites "Merriam-Webster online Dictionary (2022)" for of its definition of "provided, however." Answer Br. at 23. But that two-word term does not appear in that dictionary.

P. 410, 413 (Colo. Ct. App. 1901) ("We think it manifest that the true intent and meaning of the contract was that the defendant had an option to take up the bond, or not, as she chose, provided, however, that, if she did take it up, she must convey to the plaintiff a one-eighth interest in the property."); C.R.S. § 39-28-202(9)(a)(I) (using "provided, however" to exempt an entity from the definition of "Tobacco product manufacturer" in the statute). The phrase is used to introduce exceptions in the constitutional regulation of taxes as well. *See*, *e.g.*, Colo. Const. art. X, § 11 (limiting state property tax rates, "provided, however, that in the discretion of the general assembly an additional levy" may be assessed for limited, specified purposes).

Therefore, Measure 4D's combination of "PROVIDED, HOWEVER," and "NO LOCAL TAX RATE OR PROPERTY MILL LEVY SHALL BE INCREASED AT ANY TIME," CF, 289 ¶6, show that the voters never approved a change in the *rates* beyond what they were paying at the time of both TABOR and Measure 4D—0.5 mill. If the Water District wanted more money via property tax revenue, it was empowered to do so, but only by asking the electorate.

CONCLUSION

For the foregoing reasons, the District Court's determination of a question of law under Colorado Rule of Civil Procedure 56(h) should be reversed and the case remanded for class certification and trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was delivered to the Clerk of the Court on July 10, 2023, via electronic filing. Consistent with C.A.R. 30, service on Defendants will be accomplished by the Court's E-fling System.

/s/ Tyler Martinez
Tyler Martinez