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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80203

On Petition for a Writ of Certiorari
Colorado Court of Appeals
Hons. Hawthorne, Pawar, & Taubman
Case No.: 23 CA 138

District Court, Logan County, Colorado
Hon. Robert C. James
Case No.: 2021 CV 030049

Lower South Platte Water Conservancy District,

Petitioner,

v.

James Aranci, *et al.*,

Respondents.

▲ COURT USE ONLY ▲

Case No.: 2024 SC 295

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RESPONDENTS' BRIEF IN OPPOSITION

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 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. 53(f)(1).

☑ It contains 3,549 words (principal brief does not exceed 3,800 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 petitioner,** 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 respondent** 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, C.A.R. 32, and C.A.R. 53.

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

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ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

The Taxpayer's Bill of Rights requires "voter approval in advance for… any… mill levy above that for the prior year." COLO. CONST. art. X, § 20(4)(a). In December 2019 the Lower South Platte Water Conservancy District ("Water District") doubled its mill levy, without referring it to voters before it went into effect. Did the Water District act unconstitutionally under the Taxpayer Bill of Rights?

STATEMENT OF THE CASE

James Aranci, Jack Darnell, Charles Miller, William Lauck, and Curtis Werner ("Residents")[1] saw their property taxes to the local Water District[2] double. App. A ¶1. But the Taxpayer's Bill of Rights ("TABOR") requires "voter approval in advance for… any… mill levy above that for the prior year." Colo. Const. art. X, § 20(4)(a). Without such a TABOR

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[1] All Residents have owned property in jurisdiction of the Water District and are electors within the Water District. App. A ¶1.

[2] "Water District" means the Lower South Platte Water Conservancy District, which covers portions of Logan, Morgan, Sedgwick, and Washington Counties. App. A ¶2. The country treasurers collect taxes on behalf of the Water District. *Id*. (citing C.R.S. § 37-45-128).

vote on their increased property taxes, the Residents filed a Class Action Complaint alleging violations of TABOR and seeking class certification. App. A ¶7. The Residents asked the District Court to enjoin collection at the higher mill levy rate and refund the difference that was collected. *Id*. The parties stipulated facts and filed cross-motions under Colorado Rule of Civil Procedure 56(h) for determination of a question of law. *Id*. ¶9.

At all levels of the litigation, the Water District argued that Measure 4D, a 1996 TABOR spending limit waiver, qualified as voter approval for future tax rate increases. *See, e.g.*, Pet. at 5; App. A ¶42. The Court of Appeals opinion reproduced the Measure 4D ballot question language in full, including the following: "[P]rovided, however, that no local tax rate or property mill levy shall be increased at any time without the prior approval of the voters of the Lower South Platte Water Conservancy District." *Id*. ¶4.

The District Court issued an Amended Order, interpreting TABOR and the applicable statutes at issue and finding no TABOR violation. *Id*. ¶¶10–12; *see also* App. C. The District Court then issued its judgment, disposing of all claims by the Residents. App. A ¶13. The Residents timely

appealed. *See id.* ¶14. On March 21, 2024, A unanimous panel of the Court of Appeals revered the District Court, finding the increase in the "mill levy from 0.5 mill to 1.0 mill in 2019 and subsequent years without voter approval was unconstitutional under TABOR." *Id.* ¶44.

The Water District then filed a Petition for Certiorari in this Court. Lower S. Platte Water Consv. Dist. Pet. for Certiorari (May 2, 2024). Six days later, the Water District filed an Amended Petition. Lower S. Platte Water Consv. Dist. Amended Pet. for Certiorari. For clarity, Residents respond to the Amended Petition simply as "Petition."

ARGUMENT

I. PRESERVATION OF THE ISSUES AND STANDARD OF REVIEW.

A. The Residents' Arguments Were Preserved Below.

As it did in the court below, the Water District argues that the Residents waived the ability to dispute whether the Water District exercised *Huber* ministerial action or whether it was discretionary, legislative-type decision making in setting its budget. Pet. at 9. In support of this, the Water District claims the District Court below held there was no evidence or argument in the record on this matter. *Id.* This is not true,

the Residents repeatedly discussed the *Huber* discretionary issue and thereby preserved it. The unanimous Court of Appeals agreed: "We conclude that the issue was preserved." App. A ¶16.

In *Huber v. Colorado Mining Association,* 264 P.3d 884, 892 (Colo. 2011), this Court articulated that "ministerial" tax increase "involved no legislative or governmental act beyond that specified in the statute" and therefore adjustments did not violate TABOR. Whether *Huber* applies to this case is a major point of contention. The District Court ruled it did, App. C. at 8, but the Court of Appeals reversed, App. A ¶¶37–40.

Before the District Court, the Water District asserted *Huber* applied to this case. LSPWCD's Response to Mot. for Deter'n of Q. of L. and Cross-Mot. for Deter'n of Q. of L. CF, 179 ¶5; CF, 180 ¶7. The Residents responded that the Water District had a range of quasi-legislative, discretionary options in setting its budget, 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."). The Residents further argued that *Huber* "'involved no *legislative* or governmental act beyond that specified in the statute,'" CF, 254 (quoting *Huber*, 264 P.3d at 892) (emphasis added), which is wholly unlike with the Water District's actions here.

The District Court understood that the parties debated *Huber*'s application, as evidenced by the subsequent ruling on the applicability of *Huber*'s ministerial exception. App. C at 10 ("[I]t is not an increase tax rate. See Huber, *supra*.") (underlining and italics in original, brackets supplied); *cf*. *id*. (holding the underlying statute created a mandatory formula, thus rejecting the Resident's interpretation of the law). The Residents believed the District Court's *Huber* holding was in error and argued against it in their appeal. COA Op. Br. at 14–22; COA Reply Br. 4–13. Residents did respond to the Water District's spurious arguments on waiver before the Court of Appeals. COA Reply Br. at 4–5. The unanimous decision below found the issue preserved. App. A ¶16.

In support of its waiver argument, the Water District cites *Madalena v. Zurich American Insurance Company*, 2023 COA 32, ¶ 50. Pet. at 9. But that case–and that *exact* paragraph–stands for a broad

understanding preservation for appeal. 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 (citation and quotation marks omitted). That is because "[n]o talismanic language is required to preserve an issue." *Id*. (citation and quotation marks omitted). Applied here, the *Madalena* opinion shows that the Residents properly preserved arguments for appeal with repeated arguments at specific record cites.

B. Standard of Review

A "court's order deciding a question of law under Rule 56(h) is subject to de novo review." *Coffman v. Williamson*, 2015 CO 35 ¶12. Furthermore, on questions of constitutional interpretation, appellate courts review the decisions below *de novo*. *See*, *e.g.*, *E-470 Pub. Highway Auth. v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004).

To accomplish TABOR's goals, this court must "give the provision's terms their ordinary and plain meanings," and "endeavor to avoid constructions that would produce unreasonable or absurd results" in that context. *In Re Interrogatory on House Bill 21-1164 Submitted by*

Colorado Gen. Assembly, 2021 CO 34, ¶31 ("*In Re HB 21-1164*"). And of course, "[c]ourts should not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do [so] would defeat the intent of the people." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996).

II. THERE ARE NO COMPELLING GROUNDS FOR ISSUING A WRIT OF CERTIORARI.

The unanimous Court of Appeals decision below held that the Residents were correct and that the Water District's tax change was subject to a TABOR vote. App. A ¶44. The Court of Appeals' decision rested on *five* grounds, none of which the Petition adequately addressed, and all comport with this Court's established precedent.

First, the Court below held that TABOR "clearly requires any tax policy change of a district that results or would result in a net tax revenue gain to 'have voter approval in advance.'" *Id.* ¶36 (quoting COLO. CONST. art. X, § 20(4)(a) and applying *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1214 (Colo.App.2009) ("We seek to ascertain intent, starting with the plain language of the provision and giving the words their ordinary meaning."); *see also Davidson v. Sandstrom*, 83 P.3d 648,

654 (Colo. 2004) ("Courts must give words their ordinary and popular meaning in order to ascertain what the voters believed the amendment to mean when they adopted it.").

Second, the appellate Court ruled the District Court erred in applying *Huber*'s "ministerial" exception to the Water District's act in an analysis that spread over three paragraphs and contrasted the law at issue in *Huber* with the Water District's funding statute. *Id.* ¶¶37–40 (applying, *inter alia*, *Huber*, 264 P.3d at 891–92, *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994), and *Bolt v. Arapahoe Cnty. Sch. Dist.*, 898 P.2d 525, 539 (Colo. 1995)).

Third, applying *Huber* and the constitutional text, the Court below held that, to the extent the Water Conservation Act conflicted with TABOR, the constitutional provision controls. *Id.* ¶41 (applying, *inter alia*, *Huber*, 264 P.3d at 889, 891).

Fourth, the Court of Appeals rejected the Water District's strange assertion that the 1996 Measure 4D inoculated the Water District's actions in 2019, despite expressly disclaiming any waiver of future TABOR votes. *Id.* ¶42 (applying *inter alia*, *In Re HB 21-1164*, 2021 CO

34, ¶ 41 and *Bruce v. Cty. of Colo. Springs*, 129 P.3d 988, 993 (Colo. 2006)).

Fifth, the unanimous Court of Appeals held that the Water District failed to show anything in the record that the operation of government would be hindered by a TABOR vote here. *Id.* ¶43 (applying rule of *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008)).

Because the decision of the Court below reasons on five completely independent grounds, the Petition would need to show why *each* of these five holdings are contrary to this Court's rulings. But the Petition only really focuses on its primary Measure 4D argument (the fourth argument). This Court has long held that "[c]ertiorari is not a matter of right." *Off. of State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 426 (Colo. 1999). Instead, the petitioner must show that the case is sufficiently important to justify this Court's time on the matter and that the Court of Appeals misapplied this Court's case law. *See*, *e.g.*, *Bovard v. People*, 99 P.3d 585, 592–93 (Colo. 2004)); C.A.R. 49 (non-exhaustive list of factors to grant certiorari). The Water District has failed to bear its burden.

The Water District provided a single question presented for this Court's review, Petition at 5, but the scattered arguments of the Water District suggests it is seeking review based multiple issues. It first argued waiver, which was addressed in Section I(A), *supra*. On the merits, the Water District presents as its sole question for review whether a "waiver of TABOR's revenue limitations" allowed it to double the tax rate. Pet. at 5. But the Petition ebbs with arguments on *Huber* as well. Taking each in turn reveals there is no substantial statewide issue for this Court to resolve.

A. Measure 4D's Plain Language Does Not Support a Tax Hike.

Four out of four judges have now rejected the Water District's primary argument: that a 1996 waiver of the TABOR spending limits ("DeBrucing")[3] measure authorized future tax hikes.[4] As it did at each

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[3] The term is named after the well-known proponent of TABOR, Douglas Bruce. *See*, *e.g.*, Peter J. Whitmore, *The Taxpayers Bill of Rights-Twenty Years of Litigation*, COLO. LAW. (Sep. 2013) at 35, 41 n.79.

[4] The District Court rejected the Water District's Measure 4 D waiver argument but held instead that the rate was set as a range. App. C at 11; App. A ¶11. The unanimous Court of appeals held that the District Court was correct to reject the Water District's voter DeBrucing waiver theory

stage below, the Water District fails to show how its novel theory is in accord with this Court's decisions.

The Water District principally relies upon this Court's approval of the Mesa County school districts' DeBrucing. *See Mesa Cnty. Board of Cnty. Comm'ners v. State,* 203 P.3d 519 (Colo. 2009). Pet. at 12 ("Measure 4D was materially identical to voter approved ballot questions interpreted by" the ballot measures in *Mesa County*) (underlining in original). The Water District Argues that a broad reading of *Mesa County* means DeBrucing equates to dismantling all TABOR restrictions. *Id*. Not so.

First, the language was not "materially identical." Unlike the *Mesa County* measure, the Water District's 1996 measure provided a specific clause disclaiming any right to increase taxes: "provided, however, that no local tax rate or property mill levy shall be increased *at any time* without the prior approval of the voters." App. A ¶4 (reproducing 1996

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but was incorrect to uphold the rate change as based on a range of possible rates. App. A ¶42 ("Referred Measure 4D did not waive the requirement in section 20(4)(a) of TABOR that the [Water] District must obtain voter approval").

ballot measure's text in full). That additional language, not found in the *Mesa County* measures, takes Measure 4D out of the realm of what this Court approved.

As this 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. Indeed, the *Mesa County* Court looked at the *exact language* of each, including noting some did not go as far as Mesa County's ballot measure. *See*, *e.g.*, *id.* at 525 n.3 ("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"). Like the Steamboat Springs measure in *Mesa County*, the Water District's Measure 4D was not unlimited in scope. It had dollar limits in its text, asking voters to retain and expend only "an additional sum of $13,025." App. A ¶4. And that money came from *specific* sources: "property tax revenues of $5,982 and other revenues of $7,043 collected in 1995." *Id.* After these restrictions, the Water District's voters approved

an *additional* limitation: "provided, however, that no local tax rate or property mill levy shall be increased *at any time* without the prior approval of the voters." *Id*.

In support of its argument to nullify the final clause of Measure 4D, the Water District relies on a misapplication of this Court's decision in *In Re HB 21-1164*, 2021 CO 34. Pet. at 14 ("This phrase must be interpreted in conjunction with all other provisions of the ballot question including the waiver of all revenue limitations.").

Of course, the Court of Appeals properly applied *In Re HB 21-1164*. 2024 App. A ¶42. And *In Re HB 21-1164* held that courts must "give the [ballot] provision's terms their ordinary and plain meanings," and "endeavor to avoid constructions that would produce unreasonable or absurd results" in that context. *In Re HB 21-1164*, 2021 CO 34, ¶31. A specific line saying there would be no further tax rate changes absent a vote of the people, as Measure 4D expressly provided for, must be given full effect under this Court's decision in *In Re HB 21-1164*.[5]

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[5] *In Re HB 21-1164* held that corrective action that incidentally raises tax rates (*i.e.* via rescinding temporary tax credits) does not violate TABOR. 2021 CO 34, ¶48. The Water District has failed to show how its situation

The Water District further incorrectly argues that Measure 4D approved a range of possible tax rates. Pet. at 7. As the Court of Appeals correctly concluded, state statutory law cabined the possible rates set by water districts to a maximum, 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, and the mill levy was 0.5 mill at the time of Measure 4D's passage. App. A ¶42. The voters never approved anything other than 0.5 mill. *Id*. And the 1996 public vote on the Water District's taxes expressly disclaimed there would be a tax increase, from what was then (and voters understood as) a 0.5 mill levy. *Id*. The Water District's primary argument is an *ex ante* rationalization at odds with the promise to voters that the mill levy would not increase.

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is a similar "corrective" measure. At oral argument below, the Water District refused to say what it planned to do with the new funds, arguing such things were outside the record. Ct. of App. Oral Arg. 1:54:10 https://cojudicial.ompnetwork.org/sessions/281333?embedInPoint=6850&embedOutPoint=7906&shareMethod=link (Dec. 12, 2023).

B. The Water District's Tax Hike was Not "Ministerial."

Both the District Court and the Court of Appeals spent considerable time analyzing this Court's decision in *Huber*. App. C 6–8; *id.* at 10; App. A 28 ¶¶22–31; *id.* at ¶¶37–40. In contrast, the Water District intersperses its *Huber* analysis among its more general argument on Measure 4D. Pet. at 10, 11, 13, 16. Because *Huber*'s application—or really, lack thereof—to this situation is the heart of the case, a brief discussion shows why the Water District's action was not "ministerial."

TABOR's "purpose is to protect citizens from unwarranted tax increases and to allow citizens to approve or disapprove the imposition of new tax burdens." *Huber,* 264 P.3d at 890 (citation and quotation marks omitted). It is only when something is routine, set by formula, and handled by an agency with no discretion that the ministerial exception to TABOR applies. *See id.* at 892; App. A ¶28 (discussing *Huber*) and ¶40 (applying *Huber* analysis to facts of this case).

Huber is the perfect example of a ministerial tax rate adjustment. In that case, the coal mining severance tax statute had two tiers: a base rate and an adjustment for inflation. *Huber*, 264 P.3d at 891. The statute

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); C.R.S. § 39–29–106(5). The statutory formula left "no room for a discretionary decision by the Department." *Huber*, 264 P.3d at 891.

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 but 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.* This reading of *Huber* was confirmed in 2021 by this Court. *In Re HB 21-1164*, 2021 CO 34, ¶ 46 (discussing and applying *Huber*).

The Water District claims that the requirement that it set a budget in C.R.S. § 37-45-122(2)(a) equates to a non-discretionary formula wherein the Water District adds up its costs and then can set a mill levy to pay for it. Pet. at 17. But a general mandate to pay the bills does not

transform setting a budget into anything other than a quasi-legislative *discretionary* act.

The Water District has general authority to levy taxes and make public works as part of the powers to "the comfort, safety, and welfare of the people of the state of Colorado." C.R.S. § 37-45-102(1)(g); *cf. Millis v. Bd. of Cnty. Comm'rs of Larimer Cnty.*, 626 P.2d 652, 659 (Colo. 1981) (distinguishing water districts from special districts who authority is limited and must directly benefit the land). The Water District's powers are extensive. *See* C.R.S. § 37-45-118 (water district funding options ranging from eminent domain to creating parks and recreation areas).

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. The courts have 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). Discretion is not a mandate: the use of a Class A mill levy is but one of *many* options available to water districts.

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.

The Water District holds discretionary powers, not mere ministerial functionality. Of course, the Water District may want to increase its tax rate, it just needed to ask its residents to do so under TABOR.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May 15, 2024

CERTIFICATE OF SERVICE

I certify that the foregoing document was delivered to the Clerk of the Court on May 15, 2024, via electronic filing. Consistent with C.A.R. 30, service on Petitioners will be accomplished by the Court's E-fling System.

/s/ Tyler Martinez
Tyler Martinez