SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Colorado Court of Appeals Appeals Court Case No. 2015CA002017 Appeal from the Denver District Court Civil Action No. 2014CV34803	
Petitioners/Cross-Respondents: **WAYNE W. WILLIAMS**, in his official capacity as Colorado Secretary of State; **COLORADO DEPARTMENT OF STATE,** and **THE STATE OF COLORADO.,** **v.** **Respondent/Cross-Petitioner:** **NATIONAL FEDERATION OF INDEPENDENT BUSINESS.**	**▲ COURT USE ONLY ▲**
Attorneys for Petitioners: Jason R. Dunn, #33011 Emily R. Garnett, #45047 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4437 Phone : 303.223.1100 Fax : 303.223.1111 Email : jdunn@bhfs.com; egarnett@bhfs.com	Case No.: 2017SC368
NFIB'S PETITION FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 53 including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

- The petition complies with 53(a). It contains no more than 3,800 words.
- I acknowledge that my brief may by 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/ Jason R. Dunn
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Cross-Petitioner National Federation of Independent Business ("NFIB") hereby petitions the Court to issue the writ of certiorari, and as grounds therefore states as follows.

INTRODUCTION

NFIB is a national non-profit dedicated to representing the interests of small-business owners throughout the country. The majority of NFIB's members have nine or fewer employees and gross revenue less than $350,000. In Colorado, NFIB represents over 7,000 small-businesses. (R.CF,p.225,¶2).

Every year, NFIB's Colorado members, and businesses like them, file more than 750,000 statutorily required documents with the Colorado Department of State (a/k/a the Secretary of State's office) and pay required charges for each ranging from $5 to $125 (the "Business Charges")(R.CF,pp.228-229,¶¶25,36). The Department collects over $20 million annually from these charges. However, only a small portion of that revenue is used to cover the Department's costs in collecting and managing these filings. Instead, the vast majority of the revenue – as much as 90% – is used to fund other unrelated functions within the

Department, most notably coordinating state elections and directly funding some local elections.

Under this court's jurisprudence, these "fees" are in reality a tax – money raised and spent for the general expenses of government. And as such, the Colorado Constitution, art. X § 20(4)(a)("TABOR"), requires that voters first authorize this tax. Because no such approval was obtained, the Charge amounts beyond that necessary to cover the costs of managing the business filings, along with their authorizing statutes, are unconstitutional.

NFIB brought this declaratory judgement action for prospective relief in 2014. On summary judgment, the Denver District Court declined to rule on whether the Charges were actually fees or taxes because it deemed TABOR inapplicable in the first place. Under the court's reasoning, because the authorizing statutes were enacted before TABOR (which is generally prospective only) and the Charges have only been used to fund the various operations of the Department since then, TABOR's vote requirement is inapplicable.

The court of appeals reversed. But rather than finding that the Charges are in fact taxes subject to TABOR, it held only that the record was insufficient to determine whether any of the individual Charges had actually been increased after TABOR's enactment, and remanded the case for further fact-finding. Both parties now appeal.

Certiorari is warranted for at least three reasons. First, this case presents an opportunity for this Court to expand and clarify its jurisprudence regarding when pre-TABOR statutes are subject to voter approval, which was last discussed in the 2011 *Huber v. Colo. Mining Ass'n* case, and to provide much-needed clarity around the "tax" versus "fee" distinction, which the district court seemed to struggle with and the court of appeals avoided entirely. Second, the Court has an opportunity to provide finality to a dispute that has significant ramifications for both the private and government sectors, including not only the thousands of registered businesses in Colorado, but also the myriad local governments that fund governmental operations through the use of various fees and taxes. Third, this case presents the unique situation in which both parties agree that the court of appeal's decision

was erroneous and that remanding the case for further findings will only result in a waste of resources for the parties and the courts.

ISSUES PRESENTED FOR REVIEW

1. Is section 24-21-104 entitled to a presumption of constitutionality even though it was adopted before TABOR?

2. Did the court of appeals err in refusing to determine whether the Business Charges are fees or taxes?

3. Did the court of appeals erroneously conclude that there were insufficient facts in the record to find that the Department had increased the Charges post-TABOR?

4. Did the court of appeals err in failing to consider whether the statutory scheme is unconstitutional on its face?

COURT OF APPEALS' OPINION

The opinion for which review is sought is Nat'l Fed'n of Indep. Bus. v. Williams, No. 15CA2017 (Colo. App. May 4, 2017) ("*Slip Op.*") (Appendix A).

JURISDICTION

This Court has jurisdiction under section 13-2-127, and C.A.R. 49, 51, and 52(3).

STATEMENT OF THE CASE

Section 24-21-104 was enacted in 1983 and authorizes the Secretary of State to impose the Business Charges. The statute requires the Secretary to set the individual Charges at amounts that will generate sufficient revenue to cover all of the "direct and indirect costs" of the Department, whatever those may be at any given time. C.R.S. §§ 24-21-104(1)(a), (3)(b). By law, the Secretary has plenary authority to set, increase, or decrease the Business Charges, or even create new ones, without legislative or other executive oversight. *See* id. (R.CF,p.228,¶¶21,23,26). As the Secretary stated below, the funding scheme is "an open-ended mechanism" for funding the Department. (R.CF,p.166). Perhaps as a result, annual collections from the Business Charges have dramatically increased every year since the Secretary was first given such authority in 1983. For example, in FY 1990-91 (the year before TABOR's passage), the Department collected $4.2 million. By FY 2013-14 collections totaled $18.69 million, representing an increase of over 400% in that time period. (R.CF,p.229,¶38).

The Business Charges are deposited in a segregated cash fund from which the General Assembly appropriates funds to the Department to finance all of the programs and activities assigned to or created by the Department (the "Cash Fund"). (R.CF,pp.228-229¶¶29-30). The Department is one of only two state departments that is exclusively cash funded, meaning it receives no funding from the State's General Fund.[1] While the Department provides a broad array of governmental services – from managing business documents to coordinating statewide elections to regulating charitable organizations – those services are paid for almost exclusively through the assessment of the Business Charges on document filers. But only a small fraction of the revenue is allocated to the division within the Department responsible for actually collecting and maintaining the business filings. (R.CF, pp.226,230). In FY 2013-14, for example, only 10.9% of the Department's $23.41 million budget was allocated to the Business & Licensing Division – the least of any division within the Department.

[1] The other is the Department of Transportation, which relies almost exclusively on vehicle registration fees for funding related transportation projects.

In contrast, 23.2% of the Department's budget that year was directed to its Elections Division and 41.4% to the Information Technology Division. Id. at 43. While the distribution of funds among the Department's divisions varies modestly from year to year, the unquestionable primary use of the Business Charges is to pay for functions and activities unrelated to business services. NFIB contends that this arrangement makes the Business Charges a tax rather than a valid fee.

As a tax, the Business Charges are subject to TABOR. And while TABOR is indeed prospective only, and 24-21-104 was adopted before TABOR, the funding scheme is nonetheless unconstitutional because (a) the Secretary has made post-TABOR discretionary adjustments to the Charges, (b) the General Assembly has, also post-TABOR, placed new programs in the Department that have resulted in the Charges being kept at rates higher than they otherwise would be, and (c) the relevant statutes are an open-ended grant of authority to the Secretary to raise the Charges or create new ones at will. The State Defendants responded by generally arguing that such discretion is irrelevant

because it predates TABOR. While the district court agreed with that argument, the court of appeals seemed to reject it, instead implying that any post-TABOR adjustments to the Charges are unconstitutional. *Slip Op.*,¶¶ 11,16. Nonetheless, the court of appeals did not say so expressly and instead simply remanded the case for a further findings of fact to determine whether such post-TABOR increases have occurred. *Slip Op.*,¶¶17-19. In their Joint Petition for Rehearing, filed in the court of appeals, both parties agreed that the court had sufficient facts in the record to reach a legal conclusion. That motion was denied and the parties now separately appeal to this Court.

ARGUMENT

I. SECTION 24-21-104 IS NOT ENTITLED TO A PRESUMPTION OF CONSTITUTIONALITY.

As an initial matter, NFIB argued below that section 24-21-104 is not entitled to the usual presumption of constitutionality afforded to statutes challenged under TABOR because that statute was enacted *before* TABOR. The court of appeals rejected that argument, citing only that this Court has applied the presumption to a pre-TABOR statute, and thus it would also. *Slip Op.*,p.4,fn1. (citing *Huber v. Colo. Mining*

Ass'n, 264 P.3d 884 (Colo. 2011)). But the standard of review was not challenged in *Huber* and the Court did not discuss it beyond restating the blackletter rule. Thus, this issue is one of first impression for this Court.

The presumption flows from the deference courts afford to the legislature and its law making function, and the assumption that the legislature drafts laws to comply with the Constitution. *See Mesa Cty. Bd. of Comm'rs v. State of Colo.*, 203 P.3d 519, 527 (Colo. 2009). But where, as here, the statute being challenged was enacted *before* the constitutional provision that the statute is alleged to violate, the basis for that presumption no longer exists; the legislature cannot be presumed to have drafted s statute as compliant with a constitutional provision that did not yet exist.

Section 24-21-104 was enacted in 1983, nine years before TABOR. Thus, the statute should not be gifted a presumption of constitutionality that cannot be justified. And if the presumption is inapplicable, so is the requirement that the statute be proven unconstitutional beyond a

reasonable doubt, as the latter necessarily derives from former. *See Barber v. Ritter,* 196 P.3d 238, 247 (Colo. 2008).

Thus, the Court should accept this case to clarify that TABOR challenges to statutes adopted before TABOR are not entitled to a presumption of constitutionality and should instead be reviewed under a de novo standard and the constitutional mandate that such interpretation favor a result that represents the greatest restraint of government. Colo. Const. art. X, § 20(1); *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994).[2]

II. BOTH LOWER COURTS ERRED IN REFUSING TO DETERMINE WHETHER THE CHARGES ARE TAXES OR FEES.

As the court of appeals acknowledged, "because TABOR's vote requirements apply only to taxes, and not fees, as a threshold matter, [courts] generally consider whether any challenged charge is properly categorized as a tax or a fee…". *Slip Op.*,¶10. As noted, however, the court ultimately refused to conduct that test because section 24-21-104

[2] Sections 24-21-104.5 and 1-5-505.5 regarding payments to counties were adopted after TABOR and are thus entitled to the presumption.

predates TABOR. Although the district court did apply the "tax" versus "fee" test outlined in *Barber* (and developed by the court of appeals in *TABOR Found. v. Colo. Bridge Enterprise*, 2014 COA 106), it likewise refused to conclude whether the Charges are fees or taxes.

Under the *Barber/Colo. Bridge Enterprise* test, reviewing courts should first examine "the language of the enabling statute" for textual manifestations of the legislature's intent. *Id.* ¶ 23. If the language states that a primary purpose of the charge is to raise revenue to benefit the public at large, it is a tax; but if it is to finance a particular service, then the charge may be a legitimate fee. *Id.* Second, and similarly, courts should "look to the primary purpose for which the money is raised…." *Id.*, ¶ 24. If raised for general government expenses, it is a tax; if not, it may be a valid fee. *Id.* Finally, and perhaps dispositively[3], courts should examine the nexus between those

[3] While *Barber* and its progeny have not stated expressly that the third prong of the test is dispositive, the test as outlined in those cases and elsewhere leaves little doubt that it is. *Koontz v. St. Johns River Mgmt. Dist.*, 133 S.Ct. 2586 (2013)(fee that bears little nexus or proportionality to governmental burden raises significant constitutional concerns).

paying the charge and how the collected revenue is spent. If "the primary purpose of the charge is to finance or defray the cost of services provided *to those who must pay it*", it is likely a fee. *Id.*, ¶ 25 (emphasis added). If, on the other hand, the purpose of the charge is to fund services unrelated to the payor or for the public at large, then it is likely a tax. *Id; see also Bloom v. City of Fort Collins*, 784 P.2d 304 at 312-14 (Colo. 1989)(Lohr., J. dissenting)(collecting cases); *see also State v. Medeiros*, 973 P.2d 736 (Hawaii 1999)(discussing similar test).

In applying this test, the district court found that the Charges are more akin to a valid fee under the first two prongs, but more like a tax under the third prong. *Slip Op.*,pp.3-5. It then declined to reconcile this apparent conflict, stating "[t]he current caselaw is unclear on how to weigh the three factors if all do not support classification as a fee versus a tax." Id. p.5. The court then ruled in favor of the Defendants on the basis that the statutes pre-date TABOR.

Putting aside the district court's erroneous reliance on the date of enactment (which is addressed in Section III below), the court's finding that the Charges are at least in part akin to a fee is incorrect because it

was based on a fundamental misunderstanding of what distinguishes a "particular service" from "general government services" under the test. More specifically, the court erroneously concluded because the text of section 24-21-104 establishes the primary purpose of the Business Charges is to "finance the Department's services and operations" and the Secretary is required to set and adjust the Business Charges so that the amounts collected approximate the Department's direct and indirect costs, "the General Assembly is clearly indicating that *the Department* is a particular government service and the [Business Charges] are being raised solely to finance the Department." (R.CF,p.352)(emphasis added).

In reaching that conclusion, the district court created a definition of "fee" under which an entire state department, and all of the programs in it, no matter how disconnected or expansive, can be a "particular service" and need not bear any nexus to those paying the charge funding that service. That definition is unprecedented in jurisprudence discussing when a Tax is applied constitutionally and cannot be squared with this Court's TABOR cases.

Stated correctly, the nature of the service is critical because the hallmark of a true fee is that it is imposed only for the purpose of offsetting the costs of a *specific* service *that is related to those paying the charge*. *Bloom*, 784 P.2d at 313 (Lohr, J. dissenting); *see also Bainbridge, Inc. v. Bd. of Cnty. Comm'rs,* 53 P.3d 646 (Colo. App. 2001)(holding building permit fee must be limited to cost of operating building department); *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007)(holding specialty license plate charge used to fund general government operations a tax). While "mathematical exactitude isn't required", *Bloom*, 784 P.2d at 308, the fee must fund only services that have a nexus to those paying the charge. *Koontz*, 133 S.Ct. 2586.

Although the district court failed to properly apply this test or correctly analyze the first two prongs, it did correctly find that those paying the Business Charges "are not reasonably likely to benefit from or use much of the services they fund" under the third prong. (R.CF,pp. 352-53). Thus, it was the district court's flawed understanding of what constitutes a "particularized" or "specific" service in the tax/fee analysis that led it to erroneously conclude that the text of section 24-21-104 is

properly limited to ensuring that the Business Charges finance only such a service. Once the correct understanding of what constitutes a "specific service" is applied, there is little doubt that the Business Charges are taxes under each of the three *Barber/Colorado Bridge Enterprise* factors: (1) the text of 24-21-104 expressly states that it is intended to fund a diverse array of unrelated governmental services, (2) the primary purpose of the statute is "revenue production", and (3) there is simply no reasonable nexus between the amount of the Charges and the services provided (as the district court agreed).

Accordingly, there should be little doubt that the Business Charges are taxes under this Court's test. Not only did the district court and court of appeals erroneously refuse to reach that conclusion, but the district court's attempted application of the test was equally flawed. This court should grant certiorari to remedy those errors and to apply the proper test to the facts at hand.

III. THE RECORD SHOWED VARIOUS POST-TABOR INCREASES TO THE BUSINESS CHARGES.

In determining whether there was a "tax rate increase" or a "tax policy change resulting in a net revenue gain" that would trigger

TABOR's vote requirement, the court of appeals concluded that "the parties presented no evidence indicating whether these charges themselves have been increased since the passage of TABOR." *Slip Op.*,¶11. As detailed below, that is incorrect for two reasons. First, the stipulated facts expressly cite examples of the Department increasing individual Charges, as well as examples of post-TABOR legislative enactments that artificially inflated the Charges. Second, it fails to recognize that regardless of whether there has been actual dollar increases to the amount of individual charges, the statutory scheme itself is facially unconstitutional because it grants unlimited discretion to the Secretary to increase the Charges at any time and in any amount.

A. The stipulated facts showed specific increases to the Business Charges.

As part of the summary judgment proceeding, the parties jointly submitted stipulated facts. Among them was the fact there has been at least several post-TABOR upward adjustments to some of the individual charges. (R.CF,p.228). NFIB referenced this fact in its briefs to the court of appeals (Reply Brief,p.24), yet the court failed to

acknowledge that fact, concluding instead that there was no evidence that the Business Charges have been increased post-TABOR. *Slip Op.*,¶¶17-19. Reversal of the court of appeals and judgement in NFIB's favor is warranted on this basis alone.

Along with citing to those actual dollar increases, NFIB also argued that it was a tax rate increase each time the General Assembly, post-TABOR, added a new program or cost to the Department that necessitated higher Business Charges, or caused the Secretary to keep the Charges higher than they otherwise would be due to the requirement that they be set at amounts to cover only the Department's direct and indirect costs. The stipulated facts cited two recent examples of such post-TABOR drivers of higher rates: First, in 1999 the General Assembly amended section 24-21-104.5 to require periodic payments from the Cash Fund to each of Colorado's sixty-four counties to help pay for their election costs. The General Assembly then increased the county payment amounts in 2006 and again in 2012, such that the total is now over $2 million per election. (R.CF,p.234,¶¶76-770); C.R.S. § 1-5-505.5 (setting out current funding formula). Second, in 2013, the

General Assembly enacted a law requiring the Department to spend over $1.3 million to develop an all-mail-ballot election system for Colorado. (R.CF,p.233,¶62). Any of these acts could have been funded from the State's General Fund, but the General Assembly instead chose to fund them through the Business Charges; a funding scheme the district court deemed wholly "unfair" to NFIB's members. (R.CF,p.364).

More to the point, however, had the legislature not imposed those costly programs on the Department, it is indisputable that the amount of the Charges would have necessarily *decreased* in order to meet the statutory mandate that the Secretary not collect revenue beyond the amount necessary to cover the Department's costs. *See also* C.R.S. 24-75-402 (setting additional 16.5% reserve cap on Cash Fund). This Court has expressly held that a decision to keep a tax rate artificially higher than it otherwise would be is a tax *increase*. *See Barber*, 196 P.2d at 252. NFIB made this argument more fully in its briefs below, yet the court of appeals failed to address it in its opinion. This Court should accept this case in order to do so.

B. The lower courts improperly refused to evaluate whether the statutory scheme is unconstitutional on its face.

Finally, putting aside the actual post-TABOR increases to the Charges, the court of appeals also failed to address NFIB's argument that the statutory scheme is unconstitutional on its face because it gives the Secretary unlimited discretion to impose new taxes or increase existing ones at will. The court reasoned instead that because section 24-21-104 pre-dates TABOR, the only relevant question is whether the Secretary made post-TABOR adjustments to the Charges. *Slip Op.*,¶11. The court also refused to consider the fact that the so-called county reimbursement statutes were enacted *after* TABOR, because in the court's view, those are merely spending statutes, not authorizations to impose a new charge. *Slip Op.*,¶20. The court's reading of those statutes, and its refusal to evaluate whether the statute was unconstitutional on its face, was erroneous.

Somewhat oddly, however, the court did seem to recognize the fatal flaw in the statute when it contrasted the discretionary scheme

here from the nondiscretionary coal-tax formula at issue in *Huber v. Colo. Mining Ass'n*:

> [U]nlike in *Huber*, section 24-21-104 does not specify how the Business and Licensing charges are to be adjusted over time. Rather, the Secretary's discretion is limited only by the upper ceiling for the total revenues matching the approximated costs and budget for the Department. As the array of services that the Department provides is diverse and changes over time, matching the total revenues to the budget is not a predictable, defined tax mechanism.

Slip Op.,¶16. Nonetheless, the court stopped there and did not analyze whether that conclusion renders the statutes here unconstitutional. Similarly, the district court also recognized this discretion, but then went further and expressly declined to factor it into its analysis. (R.CF,p.354). Despite both errors, this Court has expressly held that analyzing a statutory framework's authorization to impose a future tax is wholly appropriate, and has done exactly that in a similar case. *See Bloom*, 784 P.2d at 311 (ordinance allowing future excess fee revenue to go to the city's general fund was an impermissible tax).

Like the pour-over provision in *Bloom*, the relevant statutes here are unconstitutional because they grant unlimited discretion to the

Secretary to increase the Business Charges, virtually uncabined by any meaningful restraint. As the Secretary stipulated to, he "has the discretion to set, increase, decrease, and/or temporarily suspend the Department's various [charges] without legislative oversight or other executive oversight." (R.CF,p.228). This is the legal equivalent of a statute authorizing the director of the Department of Revenue to increase the state income tax at will at any future date. There can be little doubt that such legislation would be facially unconstitutional under TABOR even absent an actual increase by the director. Such is the case here. Because the lower courts refused to properly conduct that analysis or reach that conclusion, certiorari is warranted.

CONCLUSION

This Court should grant the Petition and issue the writ of certiorari to the court of appeals.

Respectfully submitted this 17th day of July 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2017, a true and correct copy of the foregoing **NFIB'S PETITION FOR WRIT OF CERTIORARI** was electronically filed with the Supreme Court and served via Colorado Courts E-Filing upon the following:

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