Colorado Supreme Court 2 East Fourteenth Street Denver, Colorado 80203	
Appeal Pursuant to CRS 1-11-203.5 District Court, 8th Judicial District Larimer County, Case No. 16CV230	
Plaintiff-Appellant: Larry Sarner, v. **Defendants-Appellees:** Angela Myers, Larimer County Clerk and Recorder, and City of Loveland.	▲ COURT USE ONLY ▲ **Case No. 2016SA261**
Self-Represented Plaintiff-Appellant: Larry Sarner, *pro se* 711 West Ninth Street Loveland, Colorado 80521 Telephone: 970-667-7313 larry.sarner@gmail.com	

ANSWER BRIEF OF PLAINTIFF-APPELLANT

SUMMARY OF ARGUMENTS MADE BY APPELLEE CITY OF LOVELAND IN ITS OPENING BRIEF

The Appellee City of Loveland in its Opening Brief argues just two principal issues: (1) that the Order for Dismissal in the court below was not an abuse of discretion, and (2) that the substantive issues for the election contest are, because of the dismissal, not properly before the Court.

The City's argument on its first principal issue is multi-faceted.

First, it argues that the totality of law that controls the bonding requirements of CRS §1-11-203.5 is limited to a single sentence:

> Before the district court is required to take jurisdiction of the contest, the contestor shall file with the clerk of the court a bond, with sureties, running to the contestee and conditioned to pay all costs, including attorneys fees, in case of failure to maintain the contest. (CRS §1-11-203.5(1))

This sentence must, according to the City, be literally interpreted with no attention paid to other elements of the same section of statute, let alone a broader field of law that includes the Colorado Constitution. See section I.A. of City Opening Brief, which states:

> ...the General Assembly made a policy determination that a meaningful bond sufficient to cover *costs*, including attorneys fees' *shall* be filed before the court is required to take jurisdiction. Although Sarner questions the wisdom of that policy, the duty of this Court is recognize and enforce the policy choices of the General Assembly, as expressed through a valid statute. [emphases added]

and goes on to state:

> Requiring the district court to accept a bond that, on its face, could not possibly cover 'all costs, including attorneys fees,' would render the 'attorneys fees' language superfluous and thwart the General Assembly's intent and chosen legislative scheme

The City next states that the district court judge did not abuse its discretion in the demand that a $10,000 bond be filed before the court acquires jurisdiction. The City holds, "The district court's ruling is within the bounds of rationally available choices." Then conclusorily stating, "The record supports the district court's ruling as reasonable, and not an abuse of discretion." (See section I.B. of City Opening Brief.)

Finally on this issue, the City states that I failed to take advantage of existing procedures to "waive the bond requirement, and therefore no due process violation occurred." Essentially, the City argues that because I didn't claim *forma pauperis*, my objection to a high bond demand is moot. (See section I.C. of City Opening Brief.)

I answer all the foregoing in my Section I below.

The City's argument on its second principal issue essentially rejects the necessity of addressing the election contest itself.

Asserting that lack of adjudication in the court below precludes this Court from considering the merits of the contest, regardless of the outcome of the appeal on the dismissal. There is, however, a perfunctory rejection, with no specificity, of

all contest-related issues as not being "ballot title challenges." In a footnote, the City requests a supplemental briefing in case the Court disagrees with their position. I answer all of these in Section II below.

I. Abuse of Discretion.

A. The Bond Requirements of §1-11-203.5, When Harmonized with All Other Provisions of the Statute, Other Controlling Statutes and the Colorado Constitution, Cannot Be Interpreted to Require a $10,000 Bond in the Present Instance.

It is no surprise to find that the City has, in their Opening Brief, once again ignored the substance of the dispute that places this case before the Supreme Court of Colorado and of the standard of review that must be utilized by the Court to resolve the dispute. A similar tactic was employed in the district court. This is not argued in good faith.

To succeed with its specious argument, the City would have the Supreme Court adopt an overly strict meaning of the requirements for filing a bond in pre-election ballot question contests based entirely upon the literal interpretation of a single component piece of §1-11-203.5. (City Opening Brief: Argument I.A. p. 6) The interpretation of this single component offered by the City fails to be internally consistent with other provisions of §1-11-203.5 and, more importantly, is completely inconsistent with TABOR. Furthermore, the City has made a mockery of the discretion required of a district court judge in determining the sufficiency of

a bond by holding that a judge must ignore rather than harmonize all law applicable to the circumstance and therefore be bound by a single dictate.

In other words, the City is placing the entirety of its hope of preserving the errant decision of the court below upon a literal reading of a single sentence while ignoring all other sections of a law. Granted, if that single sentence stood entirely alone in this field of law, any contestor in any ballot question contest would necessarily be required to post a bond sufficient to cover all costs and fees of the contestee, but the law is not applied by transfixing on a single sentence in a statute. Rather, a court is obliged to harmonize internal and external points of law that apply to any given circumstance. The City knows this, but nonetheless clings to its fiction as the only possible escape from the consequences of its attempt to preserve the misleading ballot language and the disenfranchisement of nearly the entirety of its electorate.

The misdirection inherent in this approach becomes immediately apparent as soon as the myopic standard of review invoked by the defendant is expanded to include a few other canons of statutory construction and the erroneous statements made by the City that attempt to constrain the interpretation of the statute are excised from this discussion.

"When reviewing a specific provision of a statute, we consider the statutory scheme as a whole in an effort to give consistent, harmonious, and sensible effect

to all its parts." *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P3d 1188, 1192-93 (Colo. 2004). "If interrelated statutory sections are implicated, we apply the same rules of construction to further the underlying intent of the statutory provisions." *Simpson v. Bijou Irrigation Co.*, 69 P3d 50, 59 (Colo. 2003). (see also *Gumina v. City of Sterling*, 119 P3d 527 (Colo. CtApp, 2004))

An erroneous statement was made by the City in its Opening Brief: "The statute [§1-11-203.5] does not specify criteria by which the bond's sufficiency is to be measured." (Section I.B). To the contrary, §1-11-203.5(3) contains just such criteria:

> If the court finds that the order of the ballot and the form and content of the ballot title conform to the requirements of the state constitution and statutes and further finds that the suit was frivolous as provided in article 17 of title 13, C.R.S., the court shall provide in its order an award of costs and reasonable attorneys fees to the contestee state or political subdivision and to the proponent of an initiated measure.

This provision can only be taken to mean that a finding that a contest was frivolous will be met with an award for costs and fees. However, it says nothing about awarding costs and fees in any other circumstance. Thus, the failure to interpret §1-11-203.5 in a manner to provide even for internal consistency significantly weakens the argument the City made for the imposition of a costs bond in the amount of $10,000.

Of course, to fully understand all relevant considerations that must be weighed by a judge when determining the sufficiency of a bond, other provisions of law must also be weighed in order to provide for external consistency. This is particularly important in areas of law controlled by our Constitution. A reviewing court must assume that the "legislative body intends the statutes it adopts to be compatible with constitutional standards." *Meyer v. Lamm*, 846 P2d 862, 876 (Colo. 1993). In this regard, no other consideration is as important as the fee shifting provisions of TABOR itself:

> Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. Colo. Const., Art. X, Sec. 20(1).

In comparison, it can be seen that effect of the costs-and-fees provision in §1-11-203.5(3) is nearly identical to the costs-and-fees provisions in TABOR. This comparison was even made by me in my Motion to Deem Bond Sufficient to the court below (Petition for Rule, Exh. 12, ¶12), and in every instance since has been ignored by the City in its pleadings. The few differences between the two become significant in that the Constitutional provision, which is superior law, actually ***prohibits*** the award of fees and costs to a defendant unless the case is deemed frivolous.

As it has never been suggested, nor could it be argued in good faith, that my contest was not a TABOR enforcement action, it must be concluded that an award

of fees and costs in my contest was ***prohibited*** by the superior law of TABOR. A judge tasked with determining the sufficiency of a bond in a ballot question contest brought to enforce TABOR could not possibly presume that the General Assembly meant for the fee shifting provisions of TABOR to be ignored.

> Although constitutional provisions which are self-executing require no implementing legislation, legislation that furthers the purpose of self-executing constitutional provisions or facilitates their enforcement is permissible. However, legislation which directly or indirectly impairs, limits or destroys rights granted by self-executing constitutional provisions is not permissible. *Zaner v. City of Brighton*, 917 P2d 280 (Colo. 1996), citing *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 189 Colo. 1, 9, 536 P2d 308, 315 (1975); *People ex rel. Clay v. Bradley*, 66 Colo. 186, 188, 179 P 871, 871 (1919); and *Loonan v. Woodley*, 882 P2d 1380, 1386 (Colo.1994).

Thus, the City's argument that "the General Assembly made a policy determination that a meaningful bond sufficient to cover 'costs, including attorneys fees' *shall* be filed before the court is required to take jurisdiction" is simply inaccurate. The General Assembly could not have made such a blanket policy that conflicts with TABOR. Since we know that §1-11-203.5 was created specifically as a response to TABOR (*Cacioppo v. Eagle County School District RE-50J*, 92 P3d 453, Colo. 2004), it cannot possibly be correct that the General Assembly also sought to undermine TABOR with the adoption of its subsequent statutory enforcement mechanism.

It is is also completely erroneous for the City to state, "*Although Sarner questions the wisdom of that policy*, the duty of this Court is to recognize and enforce the policy choices of the General Assembly, as expressed through a valid statute." (emphasis added) First off, I have never questioned the policy choices of the General Assembly. Rather I have tried to faithfully litigate this contest from its beginning with respect and understanding for the policy choices that have been made, even though such have felt rather onerous at times. Unlike the City, apparently, I tried to thoroughly investigate all applicable provisions of law, then pursued a course that was informed by appropriately harmonizing all parts. At every step of this process I have been mindful of the duty and limitations of the branches of government and this led me to correctly conclude that filing a $10,000 bond was not necessary to have the contest I brought summarily adjudicated.

In fact, my approach to this contest has been so respectful of rule of law, that I have paused to contemplate that perhaps a bond was required because there may be no *existing* case law which holds that a bond amount cannot greatly exceed that which may be awarded. Perhaps this, too, is a matter of first impression that the Court should consider resolving. Either way, it seems safe to say that a bond amount that exceeds what can reasonably be awarded is inconsistent with common law and common sense. To find otherwise is tantamount to barring people of ordinary means from enforcing the requirements of TABOR and would require that

the Court reverse itself in previous decisions. *City of Wheat Ridge v. Cerveny*, 913 P2d 1110 (Colo. 1996).

The substance of this dispute is not complicated. Ordinary citizens are allowed to enforce the requirements of the TABOR in district court without fear that they will be subjected to awards of fees and costs if they fail to prevail. *Cerveny, supra.* The only caveat to this constitutional guaranty is for citizens who bring frivolous actions and consequently can be subjected to fees and costs. This is not a frivolous action and apparently the defendant City now agrees because they have apparently abandoned their claim of frivolity that was leveled in the district court proceeding and they have made no motion for an award in the court below. Since the only way to enforce many of the requirements of TABOR is to contest a ballot question pursuant to §1-11-203.5, the only way that fees and costs could be awarded in this action is if the contest was deemed frivolous, which it could not be when it raises many issues of first impression and substantive grounds for the contest.

Conclusion. The only possible motivation for demanding a bond amount inordinately higher than ever could be awarded under our laws is for the purpose of obstruction, delay and denial of fundamental fairness. Had I any idea that such a demand would be a *lawful* option open to the district court, I would not have begun this contest. Neither would have anyone else. If the order of the district court is

allowed to stand, it is highly unlikely that anyone will ever attempt to preserve free and fair elections in a ballot question contest again. A lengthier explanation of this very simple logic was drawn out in my Opening Brief here and in affidavit and pleadings in the court below.

B. The District Court Abused Its Discretion by Requiring a $10,000 Bond and Dismissing the Action When One Was Not Posted.

Much of the argument that refutes the City's assertion that the district court judge did not abuse his discretion is laid out in Section A. above. An inappropriately selective understanding of statutory construction was applied to conclude that a $10,000 bond was required prior to the court acquiring jurisdiction of the contest. This was an abuse of discretion made by the district court.

Additionally, the district court failed to note that election contests are adjudicated on a substantial compliance basis.

> (T)he exercise of the voting right [should not] be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters. *Lamm*, *supra* at 875 (citing *Erickson v. Blair*, 670 P2d 749, 754 (Colo.1983)).
>
> In the voting rights context we have held that the rule of 'substantial compliance' provides the appropriate level of statutory compliance to 'facilitate and secure, rather than subvert or impede, the right to vote.' *Loonan, supra,* citing *Lamm. supra.*

Thus, even if there were some legitimate doubts about the sufficiency of the $50.00 bond that I posted, and there should have been none, those doubts should

have been necessarily resolved by noting that it would be preferable to avoid disaster by allowing the contest to be summarily adjudicated at the possible risk to the City's financial position than allowing ballot questions that were alleged to be inconsistent with state law to be voted by an electorate that was inconsistent with TABOR.

Given the fact that an award to make the City whole could only be made if the action I brought was frivolous, the determination of whether or not my action was frivolous, or even had the possibility of eventually being deemed frivolous, automatically became a threshold issue in the determination of sufficiency and the decision to acquire or decline jurisdiction. Yet, we can see no evidence that such a threshold decision was ever contemplated. Instead it is accurate to say that the district court judge simply concluded that the potential exists for *any* case to be deemed frivolous and thereafter concluded that it was best to proceed with the presumption that this contest was frivolous. Consequently, an order for a $10,000 costs bond was entered and the case dismissed for failure to file one in that amount. The order was unnecessary, obstructive and dilatory. Circumstances had previously led the Court of Appeals to find that a *zero* dollar bond was sufficient prior to the issuance of writ of attachment. *Old Republic Nat. Title Ins. v. Kornegay*, 292 P3d 1111 (Colo. CtApp. 2012).

C. I Had No Reason to Take Advantage of Existing Procedures to Waive The Bond Requirement.

The City appears to have conveniently forgotten that coincident with filing my petition for contest with the district court, I also moved to waive the bond requirement giving reasons similar to those argued in sections A. and B. here. (Petition for Rule, Exh. 6, particularly ¶¶10-18) The City opposed my motion, arguing that the statutory requirement was absolute.

The City makes much of the opportunities available to request leniency and waivers that may have been utilized in this circumstance. These opportunities are not unknown to me, but they were not needed. I had sufficient funds available for filing fees and other costs. I was aware of the possibility of a bond requirement, but I met that challenge head on with fore-knowledge of the constitutional guaranty that precludes an award of costs and fees ever being ordered against a petitioner who brings a meritorious case to enforce the requirements of Article X section 20 of our Constitution.

I think it worth mentioning at this juncture that I did not utilize the services of a registered attorney. If I had, I believe any fees I incurred would have to be paid out of public funds in the event that either I succeeded in reforming either of the ballot questions or the opposition that was interposed against me was deemed frivolous. Given the facts of this case including the failure of the City to

Conclusion. There can be no doubt that the district court pre-judged the frivolity of my case at the urging of the City. There can be no doubt that this had the effect of guarding against the non-existent interests of the City in a TABOR enforcement action at the expense of the legally protected interests of the electorate that §1-11-203.5 itself was legislated to enforce. This was precisely the sort of abuse of discretion that a substantial compliance standard is to guard against. The judge should have either made a determination of frivolity as a threshold issue or made a presumption that my action was not frivolous and summarily adjudicated the matter to protect the interests of the electorate. The failure to do so was a patent abuse of discretion that could never be described in good faith as a reasonable response to the list of rationally available choices that is made larger by a substantial compliance standard. Rather, the dismissal of this case by the district court is more properly described as having the effect of subjecting the voters to confusion and disenfranchisement at the behest of a municipal government that was feigning a non-existent worry of injury. No reservations should be placed upon expressions of antipathy for a government that treats its citizens this way. Describing what happened as an abuse of discretion is the least of charges that might be made.

acknowledge, let alone argue, the basic nature of this dispute, it is not unreasonable to speculate that the City was especially cavalier with its opposition because it knew that no fees could be awarded pursuant to CRCP Rule 121 section 1-15 despite the frivolity of its opposition.

Conclusion. I maintain that I have actually attempted to spare the taxpayers of the City some expense by bringing this case as a self-represented litigant. This is consistent with my intent to spare the voters of the city from confusion and disenfranchisement. I will maintain now and forever into the future that my responsibilities as a citizen of the City required no less of me. I am proud to have done what a person of ordinary means can do in these circumstances to preserve free and fair elections without requesting special exceptions from the courts in any way.

II. Issues Properly Before the Court.

In its summary of arguments the City made the following statement (City Opening Brief, p. 5):

> All other issues raised by Sarner in his "Petition for Rule to Show Cause" are not properly before the Court because they were not addressed or adjudicated in the district court's dismissal order from which Sarner appeals.

The unique, expedited right appeal to the state's highest court embedded in CRS §1-11-203.5 specifies that *any* order of the district court may be appealed, but

nonetheless it remains entirely within the discretion of the Court whether to accept the appeal, or what issue(s) it may consider on appeal. The Court has said here that it construing my Petition for Rule to Show Cause (i.e., request for original jurisdiction) as a "Notice of Appeal", though the Petition remains at least as a request for original jurisdiction and the court has said that such relief is proper in cases where a trial court has abused its discretion and where the usual appellate remedy would be inadequate (*Fognani v. Young*, 115 P3d 1268, 1271; Colo. 2005), and is also proper in cases which raise issues of first impression that are of significant public importance (*Wesp v. Everson*, 33 P3d 191, 194; Colo. 2001). Since both apply to the instant case, I have asked with my Petition for an exercise of your discretion to review not only the abuse of discretion on the judge below in dismissing the case (as discussed in Part I), but once decided in my favor, then also to review the issues of first impression and new theories of law presented in my contest.

The Court has a long history of recognizing that the resolution of election disputes is a matter of great public importance. (See *Meyer v. Lamm*, *supra*; *Loonan v. Woodley, supra*; their antecedents and progeny.) The General Assembly here has specified an appeal process in CRS §1-11-203.5(4) that would allow the Court to definitively decide a contest about a ballot question/title *before* an election. I am asking only that you exercise your discretion to do so in this contest

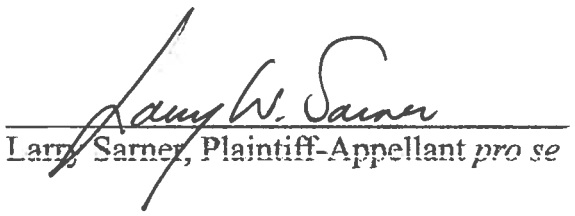
since the court below unjustly declined to do so in what would have been a timely manner. In an instance where a contestee with a meritorious case has it *wrongly* dismissed on jurisdictional grounds, it remains sensible that the highest court consider the issues giving rise to the contest *after* correcting the wrongful order for dismissal. Moreover, in cases where a wrongful dismissal was at the instigation of the contestee, that contestee should not be rewarded with further procedural delays prejudicial to the contest and likely bring a round-trip back to the Supreme Court for another attempt at final resolution, but post-election.

Next, the City also asserts (City Opening Brief, p. 16), "most if not all of the issues raised by Sarner (other than bond issues) are not framed as ballot title challenges" and concludes they are not properly included in "this ballot title contest". The assertion and conclusion is a red herring and lacks specificity. A "ballot title contest" encompasses all aspects of an issue set for a ballot, be it "title," "question," "submission clause," or any other election nomenclature. As pointed out in Part I, the entirely nomenclature in CRS §1-11-203.5 is used interchangeably and needs to be harmonized with other statutes and the constitution. The Court has previously accomplished that harmonization in *Cacioppo, supra* (challenges were time-barred, post-election, because ballot question could have been re-formed in §1-11-203.5 challenge, pre-election).

Absent any other showing by the City, all of the contest issues posed by me in my Petition involve adjudicating the conformity of the form and content of these requests for voter approvals with the requirements of TABOR for such voter approvals. They are not "addressing the merits" of the issue, or "suggesting how [the issue] might be applied if enacted" (City Opening Brief, p. 16), but rather, for instance, whether the authorizations are misleading, inappropriate, or asked of the right people.

Finally, the City also asks contingently that it be allowed to file a supplement brief if the Court decides "to address the substantive issues". (City Opening Brief, p. 17, n. 3) That is inappropriate in the *expedited* briefing schedule which the City asked for, and a shortened version was duly ordered by the Court. My arguments for a favorable resolution to what the City calls "substantive issues," appear in my Opening Brief. Unless the City chooses to respond to those arguments in their Answer Brief, then unfortunately for the City, it may have squandered its opportunity for addressing those for the Court's benefit, but that appears to have been its deliberate choice, deliberately taken.

RESPECTFULLY SUBMITTED this 18th day of October, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2016, the foregoing **Petitioner's Opening Brief** was served according to the Order of this Court to the following:

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