SUPREME COURT, STATE OF COLORADO East Fourteenth Avenue Denver, Colorado 80203	
District Court for the Eighth Judicial District Honorable Thomas French, Division 5C Case No. 16CV230	
In Re: **Contestor**: Larry Sarner, an individual, v. **Contestee**: City of Loveland, a home rule city in the State of Colorado.	▲ COURT USE ONLY ▲ Case No. 2017SA_____
Self-Represented Petitioner-Contestor: Larry Sarner, *pro se* 1739 West Eighth Street Loveland, Colorado 80537 Telephone: 970-667-2071 larry.sarner@gmail.com	

PETITION FOR RULE TO SHOW CAUSE

Pursuant to Section 3 of Article VI of the Colorado Constitution, Colorado Appellate Rule 21, and CRS §1-11-203.5(4), I, Larry Sarner, *pro se*, hereby petition this Court to issue a rule to show cause to the City of Loveland in relation to a pre-election contest which concerned the form and content of certain ballot

titles, and the ballot order of the related ballot questions in the general election just past, and sought to enforce thereby pertinent provisions of Section 20 of Article X of the Colorado Constitution (TABOR). The petitioner (me) is a long-time resident and registered elector of the proposed respondent, the City of Loveland (City), which is a home-rule city in the county of Larimer, state of Colorado. The petitioner was also the contestor in the aforementioned election contest, and the proposed respondent was the contestee in that same election contest.

RELIEF SOUGHT

In August, 2016, the City—through resolution and ordinance of its City Council—fixed the ballot language for two ballot issues, through which the City sought to gain TABOR authorizations for increasing City debt and taxes respectively. The petitioner, as contestor, timely filed a petition for the aforementioned election contest (Exh. A) in the Eighth Judicial District, Case No. 16CV230, on August 25th, 2016, alleging that the City, as contestee, had violated TABOR with the form and content of both ballot questions, and sought to reform the questions per CRS §1-11-203.5. The contestee suborned the judge to require a high costs bond of the contestor, and the judge obliged; when I did not comply, the judge dismissed for want of personal jurisdiction.

The dismissal was thereafter appealed to the Supreme Court (Case No. 2016SA261), and the Court overturned the bond demand and on October 27, 2016, remanded the case to the district court for "further proceeding," though by this time the language two ballot issues had been fixed, ballot placement was fixed, and voting thereon had commenced; in spite of the set ballot title and language, which authorized increases in both City debt and taxes, the contestee had suborned the County Clerk to set the ballot order of both questions into the "special district" part of the coordinated ballot so that the contestor could keep 97% of city voters from voting on the issues, which included the contestor. The judge duly set the matter for hearing on November 3, 2016, but at the "trial management" conference three days before, he made it known that he would allow argument only on the original claims from August (and in response to a question, proclaimed that would preclude any argument of ballot order). He also gave the parties two days in which to file pre-trial briefs. Mine was brief (Exh. B).

The contestee used its pre-trial brief to argue for a motion to dismiss for lack of standing to bring the contest (Exh. C). They made that motion to dismiss late in the hearing. I objected that it should have been made sooner, but that was over-ruled and the judge took it "under advisement". On November 5, 2016, the judge issued two orders in the case (Exh. D). The first dismissed the case for lack of standing. The second entered a judgment in favor of the contestee.

On November 8, 2016, the election concluded with both ballot questions at issue here being *defeated* by the voters allowed to vote. Later that week, I privately approached the contestee with a settlement offer that included no opposition to vacating the judgment in light of their failure at the polls. It was publicly rejected. November 17, 2016, I filed a motion to vacate just the judgment (Exh. E), and the contestee filed its opposition on December 6, 2016 (Exh. F). The judge denied my motion ten days later (Exh. G).

The petitioner seeks relief from the orders from the court below obtained by proposed respondent. The relief specifically requested is a rule to show cause why:

(a) The order denying the motion to vacate the judgment should not be reversed as *ultra vires*.

(b) The order dismissing the case for lack of standing should not be reversed.

(c) An order should not be issued requiring any TABOR ballot issue that purports to authorize a raise in any city tax or any city debt to allow the participation of every registered elector in the City, and no one else.

BASIS FOR ORIGINAL JURISDICTION

This petition is **in part** a notice of appeal, by statute (CRS §1-11-203.5(4)) directly to the Supreme Court, of the jurisdictional decisions made by a district

court , in which the judge engaged in juridical gymnastics to allow himself *both* to dismiss the election contest (for lack of standing), *and* to enter a judgment in favor of the contestee, all the while ignoring the basic dispute underlying the action. In the judgment entered, the judge ignored entirely the merits of two of my three claims, and on the third ignored evidence that the ballot language was incorrectly formed. I made a timely motion to vacate the judgment—arguing that the *entry* of it was *ultra vires*—but that motion was denied by the judge, recasting my motion as one to reconsider his orders (plural), saying there was nothing new presented to change his opinion on either of them. In the process, the judge denied me due process, and raised at least five substantial questions of law, that justify the Supreme Court's decision on original jurisdiction under CAR 21.

Ultra Vires

The bizarre circumstances which arise from the denial, I think puts me in an awkward position for an "ordinary" appeal to the Supreme Court—if ever there could be such a thing. CRS §1-11-203.5(4) pointedly does not specify the manner of appeal, but only that it should be decided expeditiously:

> "Notwithstanding any other provision of law, any appeal from an order of the district court entered pursuant to this section shall be taken directly to the supreme court, which shall decide the appeal as expeditiously as practicable."

Arguably, CAR 21 could provide not only the most expeditious process for this Court to settle the issues raised in this appeal, but the greatest opportunity to avoid straining appellate procedures to achieve justice.

Should I argue *strictly on appeal* for reversal of the denial to vacate—which I regard as an unconscionable denial of due process—my grounds for so arguing (as I did with the judge below) would rely on the *fact* that the judge had dismissed the case for lack of standing, and so was without jurisdiction to enter any judgment. However, by asking on appeal for reversal of the denial to vacate, must not I also assume the validity of the dismissal, even though that assumption also eliminates even my standing to *appeal*, and the claim of *ultra vires* entry of judgment cannot be entertained. However, if I were also to argue—as I will—that the dismissal itself was not valid, then the *appeal*, based on the judge's entry of judgment *in the face of a dismissal*, appears moot. On its face, it does not appear that the *ultra vires* nature of his action can be reached through "ordinary" appellate rules. Indeed, this *Catch 22*-like appellate situation is exactly what the contestee (City of Loveland) argued in its opposition to the motion to vacate: "By making alternative, sufficient holdings, the Court efficiently adjudicated the action and set

up all appropriate issues for review on appeal."[1] (Exh. F, ¶6) Or in other words, "heads we win, tails he loses."

Whether the above matter can be argued effectively on appeal, it can be more efficiently taken up and justly decided through original jurisdiction, as the *ultra vires* issue can be decided separately and first by this Court without regard to the decision on the dismissal for lack of standing, which can follow.

Lack of Standing

There is also a similar Catch-22-like situation involved in the dismissal for lack of standing which complicates arriving at a just outcome in a strictly appellate consideration; that complication can be obviated through original jurisdiction. To explain, the dismissal was predicated on three facts that were not in dispute. First, the ballot questions at issue were seeking TABOR authorizations for the City of Loveland to the ultimate benefit of its Downtown Development Authority (DDA). Second, the placement of these questions on the ballot allowed only registered voters who resided, or owned property, within the boundaries of the DDA to vote on these questions.[2] Third, at all times pertinent to this matter, I have been a

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[1] The predicate used here ("By making alternative, sufficient holdings…") was a *non sequitur*, on the part of both the City and the judge. The *ultra vires* act of the judge was *not* in making an alternative *holding*, but in entering an alternative *order*.

[2] Unregistered residents, and corporate entities owning property in the DDA, were also allowed to vote, but while their participation was at issue in the underlying case, it was not pertinent to the jurisdictional issue over lack of standing.

registered elector of the City of Loveland, but I did not reside or own property within the boundaries of the DDA.

As the contestee in the present contest, I have been challenging my exclusion as a City voter on these TABOR authorizations for my city. The dismissal for lack of standing was solely for the reason that I was not an eligible voter (third fact above). If I was an *eligible* voter, I would have not been disputing the point (and probably would have had it dismissed if I had), but as an *ineligible* voter, I was not allowed to dispute the point.

The statute, CRS §1-11-203.5, is silent on the question of voter standing to contest a ballot title or its position on the ballot. In my opinion, that alone should have been enough to deter the judge from declaring a lack of standing, but it was not. The City in its "pre-hearing brief" (Exh. C, §I, p. 4) argued for the judge to legislate from the bench and adopt the limitation on contestee standing found in the statute providing for *post*-election contests, CRS §1-11-202 (restricts contestees to being an "eligible elector of the political subdivision," which they argued in this case meant the DDA), and so moved the court late in the hearing. The judge took their motion and argument 'under advisement'. In the first of his orders two days later, he granted the motion to dismiss on the grounds found in §202.[1]

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[1] He also erroneously asserted that I had no legally protected interest, but that was both counter-factual and subordinate to his prior conclusion that I lacked standing as an ineligible elector.

The problem with this particular ruling is that it leads to a wider, more serious denial of due process. By adopting the limitation on standing found in the *post*-election statute, the judge was also ruling out any possibility of challenging the exclusion of voters in the *pre*-election statute as well. Such a result is important, if for no other reason, it could call the constitutionality of both statutes jointly into question on equal-protection grounds for a denial of access to the courts for enforcement of TABOR. Regardless of appellate status, a judge's ruling of such importance warrants review by the Supreme Court, and original jurisdiction assures just that.

Mootness

The underlying proceeding was almost moot from its beginning. Though it had been negotiating with the Larimer County Clerk for this election since early summer, and it was warned that its ballot questions would be contested, the contestee City delayed its final setting of the ballot titles—required to be done before a contest can be initiated—until a time when there was barely time for a district court to go through the prescribed procedure for pre-election contests before pertinent election deadlines were surpassed. Once the contest was begun, then they successfully engaged in a series of dilatory actions designed to obstruct and delay so that mootness could be argued if I continued the contest past election

day. To everyone's surprise, however, they did not have a successful election. Both ballot issues failed at the polls, and so the desired TABOR authorizations were not given by the electorate they had chosen.

The failure would seem on its face to render this contest moot, but the City has pressed ahead, with the possibility of another set of ballot issues aimed at the same TABOR authorizations, to be voted on next November. (It would be their *third* attempt.) That means that the important matters at issue in the present case are capable, if not likely, to be repeated, if they evade review in this case.

Anticipating that this Court may be moved to declare this matter no longer to be a live dispute, I draw the Court's attention to the two exceptions to the doctrine of mootness. As stated by the Court in *Trinidad School Dist. No. 1 v. Lopez*, 963 P2d 1095, 1102 (Colo. 1998):

> The **mootness doctrine**, however, does not always close the door to judicial review. We have stated that there are two exceptions to the **mootness doctrine**. First, we may resolve what is an otherwise moot case when the issue involved is one that is capable of repetition yet evading review. Second, we may decide a moot case involving issues of great public importance or recurring constitutional violations. [citations omitted]

I hope, as in *Lopez*, the Court will see that both exceptions apply in this case, and that original jurisdiction is the appropriate means to follow through with them.

Disregarding Most District Voters

The preceding jurisdictional matters are in themselves matters of great public importance worthy of the Court's attention on original jurisdiction, so too are the issues which prompted the contest in the first place. In particular, they are matters of recurring constitutional violations, particularly of TABOR, by many local governments, not just the City of Loveland. Yet, they are also all matters of first impression at the appellate level, which means that they are ripe for resolution. They would have been brought up on appeal, had not the jurisdictional issues not been dilatorily imposed to delay or prevent their consideration. I would like to present them all here on original jurisdiction, but in the interest of the judicial economy, I am reducing the questions to only one additional matter of substance directly related to the jurisdictional issues above. It is: whether the voters eligible to vote in a home-rule city's TABOR authorization of taxes or debt can be more or less than the registered electors?

The City set its referenda for the general-election ballot to disregard at least 97% of the registered electors in the city from voting thereon. There is no authority whatever which establishes that TABOR requirements for voter approval permit a home-rule city to disenfranchise any of its registered electors from voting on either an increase in City taxes or City debt. Indeed, given the centrality of

voter approval to all provisions in TABOR, disregarding the participation of at least 97% of eligible voters on any question would be an absurd outcome.

The Court has previously held that TABOR authorizes all municipal voters to participate in elections held under its provisions: "Amendment 1 [*i.e.*, TABOR] provides that 'all registered voters' within a local governmental district are able to vote on taxing and spending increases." *Campbell v. Orchard Mesa Irrigation District*, 972 P2d 1037, 1040-1041 (Colo. 1998). The Court goes on to further clarify just what precisely are the qualifications for participation in a TABOR referendum:

> Amendment 1 elections invoke the voter eligibility provisions of Colorado Constitution Artticle VII, Section 1. An Amendment 1 voter *must be* a citizen of the United States, eighteen years of age or older, a resident of the state for thirty days immediately preceding the election, a current resident of the precinct [district] in which the election takes place, and a registered elector in the precinct [district]. *Id.*, at 1040.

While the Court had previously determined that TABOR does not create "a new substantive voting right" on tax matters (*Bickel v. City of Boulder*, 885 P2d 215, 225, 226; Colo. 1994), TABOR actually did not need to do so, as the fundamental right to vote was already an unquestioned right of every voter. *Meyer v. Lamm*, 846 P2d 862, 872 (Colo. 1993). "[C]itizens have the right to be free from restrictions that deny the franchise or render its exercise so difficult and inconvenient as to amount to the denial of the right to vote." *Bickel*, *supra*, at 225.

Especially with the authorization of debt, it cannot be avoided knowing that the DDA cannot of its own accord issue debt in any form. Even though the proceeds of the indebtedness may be spent exclusively for improvements within the DDA, the Ordinance calling for the TABOR election itself acknowledges the DDA's powerlessness to make plans or issue debt in furtherance of any plan, and the Respondent City has to act on behalf of the DDA. (Exh. 1 within Exh. A) And when a home-rule city issues debt, Section 4 of TABOR requires there be prior voter approval thereon, and Art. VII, Sec. 1, of the state consitution requires that every registered elector residing within the City may participate in that prior voter approval, and a home-rule city which denies that fundamental right to any registered voter runs headlong into the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. *Kramer v. Union Free School Dist. No. 15*, 395 US 621, 629 (1969).

Participation by Persons Not District Voters under TABOR

Meantime, the expansion of the franchise to voters who are not qualified to be registered electors dilutes the votes of those with a genuine interest in the outcome. Nevertheless, the Court of Appeals has held, with respect to Art. II, Sec. 1, of the Colorado constitution—

> [N]othing in that provision prohibits a home rule municipality from exercising its powers under Colo. Const. art XX, §6, to **expand** the franchise to non-resident

property owners. *May v. Town of Mountain Village*, 962 P2d 790, 795 (Colo. App. 1998) (emphasis in original).

However, the expansion recognized by the Court of Appeals in *May* is not in complete consonance with *Campbell,* which came later from the Supreme Court and specifically applies to TABOR matters. Even so, the reasoning in *May* was applied in a matter where only property taxes were being increased and individual property owners might have interests that were either positively or adversely affected by the outcome of the election. But in the immediate instance, the revenues here come not from the imposition of a new tax, but from tax 'increments' which principally affect a larger pool of taxpayers outside the DDA, who in general are not being allowed to vote. TIF changes everything from the *May* circumstances to the matter before the Court here. The proceeds from the TIF will be used to repay public debt incurred for the direct benefit of a number of property owners being allowed to vote on authorizing the debt. By allowing absentee landlords and proxies for corporate land-holders, and others beside, to participate in this referendum, the DDA is effectively stuffing the ballot box.

List of Supporting Documents.

Exhibit A. Contestor's Petition.

Exhibit B. Contestor's Pre-Trial Brief.

Exhibit C. Contestee's Pre-Hearing Brief.

Exhibit D. Orders re Ballot Title Questions.

Exhibit E. Contestor's Motion to Vacate Judgment.

Exhibit F. Contestee's Opposition to Motion to Vacate.

Exhibit G. Order Denying Motion to Vacate Judgment.

DATED this 6th day of February, 2017.

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Larry Sarner, Petitioner *pro se*