BEFORE THE COLORADO INDEPENDENT ETHICS COMMISSION

STATE OF COLORADO

Case No. 17-28

BRIEF OF *AMICUS CURIAE* COLORADO HOME RULE MUNICIPALITIES AND COUNTIES AND COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENT

Ellen DeLorenzo,

Complainant,

v.

Julie Cozad,

Respondent.

The undersigned Colorado home rule municipalities and counties and the Colorado Municipal League ("Amicus Entities") submit this brief as *amicus curiae* in support of the Respondent, Julie Cozad ("Respondent").

INTEREST OF *AMICUS CURIAE*

Amicus Entities are interested in this case because Position Statement 16-01 regarding Home Rule Counties and Municipalities (the "Position Statement," Exhibit A) issued by the Colorado Independent Ethics Commission ("Commission") on December 19, 2016, is contrary to Article XXIX, § 7 of the Colorado Constitution, which recognizes that home rule entities with ordinances, resolutions, or charter provisions that "address the matters" in Article XXIX are not covered by Article XXIX. The Position Statement also improperly asserts Commission jurisdiction over ethics complaints against the

officers and employees of home rule entities that do not have ethics provisions essentially identical to Article XXIX.

In addition, the Position Statement impermissibly infringes on the long-standing rights of home rule entities to govern on matters of local concern. Regulating the terms, conditions, duties, and standards of conduct of local officials and employees is a matter of local concern. Home rule municipalities derive this power from Article XX, § 6 of the Colorado Constitution and home rule counties derive it from C.R.S. § 30-35-201(7).

The Commission's improper exercise of jurisdiction over Weld County (a home rule county) Commissioner Julie Cozad impacts all home rule entities that have legislated on the matter of ethical behavior for local officials and employees because it sets a precedent that the Commission will act without jurisdiction against any home rule official or employee. In asserting jurisdiction, the Commission is acting *ultra vires*, because no constitutional or statutory provisions delegate to the Commission authority over home rule municipalities or counties which have elected to govern ethics as a local matter.

BACKGROUND

Amendment 41, "Standards of Conduct in Government," to the Colorado Constitution now codified as Article XXIX, was passed by the voters in November 2006 and contains the following exemption for home rule cities and counties:

> Any county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are more stringent than any of the provisions contained in this article. *The requirements of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by this article.*

Colo. Const. art. XXIX, § 7 (emphasis added).

Both before and after the passage of Article XXIX, home rule cities and counties operated successfully under their own local regulations governing standards of conduct for their officials and employees. For the eleven years after the adoption of Article XXIX, ethics matters have been handled locally in these jurisdictions without the Commission asserting that Article XXIX confers jurisdiction over home rule municipalities and counties. Then, without authority or need, the Commission issued the Position Statement which overrules the local standard of conduct provisions of every home rule municipality and county in the state.

The Position Statement contains a list of eight requirements that the Commission believes must be met by home rule entities in order to be exempt from the Commission's jurisdiction. The eight requirements in effect require home rule entities to mirror Article XXIX. In addition, if a home rule entity has *any* provision less stringent than Article XXIX, the entity has the burden to justify the provision to the Commission by proving it is "consistent with the purposes and findings set forth in § 1 of Article XXIX." Position Statement, page 4. None of these requirements are supported by the text or intent of Article XXIX.

The Commission issued the Position Statement despite objections by numerous home rule entities, the Colorado Municipal League, and groups such as Colorado Ethics Watch and Colorado Common Cause. Shortly after issuing the Position Statement, the Commission exercised jurisdiction over a former Glendale councilmember (Complaint 16-13). Glendale is a home rule municipality. The Commission ultimately dismissed Complaint 16-13 after concluding the Position Statement applied prospectively, and the events underlying Complaint 16-13 occurred before it was issued.

In the current case, the Commission has exercised jurisdiction over a home rule county official, Weld County Commissioner Julie Cozad. The Amicus Entities maintain that the Position Statement is contrary to the plain language of Article XXIX, undermines the intent of the electorate, is inconsistent with case law, and impermissibly infringes on the constitutional authority granted to home rule entities to regulate the duties and terms of their local officials and employees.

ARGUMENT

I. THE POSITION STATEMENT IS CONTRARY TO THE PLAIN LANGUAGE OF ARTICLE XXIX AND UNDERMINES THE INTENT OF THE ELECTORATE.

The Position Statement is contrary to the plain language of Article XXIX. Article XXIX does not apply to home rule entities "that have adopted charters, ordinances, or resolutions that address the matters covered by" the article. Colo. Const. art. XXIX, § 7.

Colorado courts interpret constitutional amendments by ascertaining and giving "effect to the intent of the electorate adopting the amendment." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (internal citations omitted). In determining intent, "courts first examine the language of the amendment and give words their plain and commonly understood meaning." *Id.* (internal citations omitted). If an "amendment is clear and unambiguous, the amendment must be enforced as written." *Colorado Cmty. Health Network v. Colorado Gen. Assembly*, 166 P.3d 280, 283 (Colo. App. 2007) (internal citation omitted). In order to ascertain intent, courts may consider "materials such as the ballot title, the submission clause, and the biennial 'Bluebook' analysis of ballot proposals prepared by the legislature." *Rocky Mountain Animal Def. v. Colorado Div. of Wildlife*, 100 P.3d 508, 514 (Colo. App. 2004).

A review of the plain meaning of the language of Article XXIX reveals the Position Statement goes well beyond the meaning of the phrase "address the matters covered by this article." The word "address" is defined as "to deal with." *Merriam Webster Dictionary, http://www.Merriamwebster.com/dictionary/address*. The word "matter" is defined as "the situation or subject that is being discussed or dealt with." *Merriam Webster Dictionary, http://www.Merriamwebster.com/dictionary/matter*. Applying these definitions, Article XXIX does not apply to home rule entities with regulations that deal with standards of conduct for officials and employees. Contrary to the Position Statement, the plain meaning of Article XXIX, § 7 does not require home rule entities to adopt standards identical to the Article XXIX or even address every matter covered by Article XXIX. Home rule entities may address ethics matters more generally and less stringently than Article XXIX. The Position Statement wrongly rewrites the language of Article XXIX, § 7 by requiring nearly identical provisions and placing the burden on home rule entities to defend less stringent provisions.

Article XXIX was never intended to usurp the authority of home rule entities to legislate on standards of ethical conduct for their local officials and employees. The intent of the drafters and voters was to continue the authority of home rule entities to legislate on a matter of local concern, including having provisions less stringent than Article XXIX. This intent was clearly stated by Martha Tierney, the chief author of the Article XXIX, in an exchange with Deputy Secretary of State Bill Hobbs during the May 17, 2006 Title Board hearing for Article XXIX:

> Hobbs: Line 16 says specific measures shall not apply to home rule jurisdictions that have adopted laws covering, concerning matters covered by that measure. The way I understood the measure, I think, is that home rule

> jurisdictions could have weaker ethics laws and that could prevail over this measure?
>
> Tierney: You are correct that, if a home rule city has adopted by charter, ordinance, or resolution measures that address the matters covered in this article, then home rule will prevail.

Exhibit B, page 6.

Furthermore, Article XXIX's ballot title clearly indicates the intent to exclude home rule entities with their own standards of conduct provisions:

> An amendment to the Colorado constitution concerning standards of conduct by persons who are professionally involved with governmental activities, and, in connection therewith, prohibiting a public officer, member of the general assembly, local government official, or government employee from soliciting or accepting certain monetary or in-kind gifts; prohibiting a professional lobbyist from giving anything of value to a public officer, member of the general assembly, local government official, government employee, or such person's immediate family member; prohibiting a statewide elected officeholder or member of the general assembly from personally representing another person or entity for compensation before any other such officeholder or member for a period of two years following departure from office; establishing penalties for a breach of public trust or inducement of such a breach; creating a five-member independent ethics commission to hear ethics complaints, to assess penalties, and to issue advisory opinions on ethics issues; *and specifying that the measure shall not apply to home rule jurisdictions that have adopted laws concerning matters covered by the measure*.

Exhibit C, page 1 (emphasis added). The ballot title specifically informed voters that Article XXIX did not apply to home rule entities that have legislated in the area of standards of conduct for local officials and employees. Voters may have supported Article XXIX only because of this deference provided to home rule entities. *See In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo.1996) ("[A] court's duty in interpreting a constitutional amendment is to give effect to the will of the people in adopting such amendment.").

Under the interpretation of Article XXIX in the Position Statement, the plain meaning of home rule exception has no operative effect. Rather, the Position Statement departs from the plain meaning to rewrite, sua sponte, Article XXIX. However, courts have refused to engage in such complex rhetorical arguments. *Bertrand v. Board of County Com'rs of Park County*, 872 P.2d 223, 228-29 (Colo. 1994) (rejecting a strained and complex definition of "motor vehicle" and concluding it was fair to assume that the legislature intended to apply the plain and ordinary meaning). The first step is to apply the plain and ordinary meaning of the text. *Id.* at 229. The meanings of the terms of the home rule exception in Article XXIX are not ambiguous. *See Bruce v. City of Colorado Springs*, 129 P.3d 988, 993 (Colo. 2006) (interpreting the constitutional provision of "tax increase" using its plain meaning, the Court recognized "[a]s this constitutional provision was enacted by voter initiative and is not a statute enacted by the legislature, we do not assume that all legislative drafting principles apply. . . . Nonetheless, we apply generally accepted principles, such as according words their plain or common meaning. We thereby enact the intent of the voter in the same manner as we would otherwise seek to enact the intent of the legislature."). For the home rule provision in Article XXIX, the language is plain; thus the interpretation inquiry ends there. *See Springer v. City and County of Denver*, 13 P.3d 794, 799 (Colo. 2000); *Ceja v. Lemire*, 154 P.3d 1064, 1066 (Colo. 2007) ("We need only turn to other rules of statutory construction if we find a statute to be ambiguous.").

If the electorate intended to exclude only home rule entities that have provisions as strict or stricter than Article XXIX, there would have been no need for the home rule exclusion. In addition, the drafters certainly could have used the term "as stringent" if

that was their intent. Clearly, something other than "as stringent" was intended because the much less onerous phrase "address the matters" was used. This position is further supported by use of the phrase "more stringent" in the sentence immediately preceding the "address the matters" sentence. The preceding sentence allows all cities and counties, including statutory cities and counties, to adopt standards stricter than Article XXIX. The Commission has misinterpreted the language of Article XXIX, § 7 and has ignored the clear intent of the electorate.

II. THE POSITION STATEMENT IMPERMISSIBLY INFRINGES ON THE AUTHORITY GRANTED TO HOME RULE ENTITIES TO REGULATE THE DUTIES AND TERMS OF THEIR OFFICERS AND EMPLOYEES.

The Position Statement intrudes on the long-standing principals of home rule in Colorado. Article XX, § 6 gives home rule entities the authority to create a charter "which shall be its organic law and extend to all its local and municipal matters" and provides that "[s]uch charter and the ordinances . . . shall supersede any law of the state in conflict therewith." Home rule entities have plenary power to govern on matters of local concern. *City & Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001). In matters of local concern, "[b]oth the home-rule city and the state may legislate . . . but in the event of a conflict, the home-rule provision prevails over the state provision." *Ryals v. City of Englewood*, 364 P.3d 900, 905 (Colo. 2016) (internal citations omitted).

Article XX, § 6 grants home rule municipalities the "power to legislate upon, provide, regulate, conduct and control: [t]he creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees." Likewise, C.R.S. § 30-35-201(7) grants home rule counties the power to

govern the "powers, duties, appointment, term of office, removal, and compensation of all officers and employees of the county."

The Commission concludes that "[e]thics are a matter of statewide concern and, therefore, Article XXIX, is not superseded by local charters or ordinances." Position Statement, page 5. Notably, Article XXIX *does not* state that ethics are a matter of statewide concern. Rather, the carve-out in § 7 of Article XXIX for home rule entities that have legislated on standards of conduct for local officials and employees is recognition that ethics are a matter of local concern.

In the Position Statement, the Commission relies on *In re City of Colorado Springs*, 277 P.3d 937 (Colo. App. 2012), as support for its position that home rule entities must have provisions essentially identical to Article XXIX and bear the burden of justifying any provisions less stringent than Article XXIX. However, a careful analysis of the Court's decision supports the position of the Amicus Entities and undermines the reasoning and conclusions of the Commission in the Position Statement.

In *In re City of Colorado Springs,* the Colorado Court of Appeals construed language identical to Article XXIX, § 7, which was included in the Fair Campaign Practices Act ("FCPA"):

> Any home rule county or municipality may adopt ordinances or charter provisions with respect to its local elections that are more stringent than any of the provisions contained in this act . . . . The requirements of article XXVIII of the state constitution and of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by article XXVIII and this article.

Id. at 940; C.R.S. § 1-45-116.

Article XXVIII of the Colorado Constitution and the FCPA regulate campaign finance. *Id.* at 940. In analyzing the "address the matters" provision of the FCPA, the Court first discussed home rule authority under Article XX, § 6. The Court noted that Article XX, § 6 passed by popular vote in 1912 and "was designed to confer on home rule municipalities the General Assembly's power and to limit the General Assembly's authority with respect to local affairs in home rule municipalities." *Id.* at 939. Next, the Court concluded that Article XX, § 6 has conferred on "'municipalities all the powers of the General Assembly with regard to local and municipal electoral matters.'" *Id.* at 940 (quoting *Bruce v. City of Colo. Springs,* 252 P.3d 30, 33 (Colo. App. 2010)).

The Court ultimately concluded that the "clear intent of the General Assembly [was] to exclude home rule municipality elections from state disclosure requirements when the home rule municipality has adopted its own ordinance regulating campaign practices." *Id.* The Court applied the plain and ordinary meaning of the language in holding that the City fell within the exclusion contained in the FCPA because "its Charter and campaign practices ordinance *address those matters*." *Id.* (emphasis added). Thus, the Court held that the Secretary of State did not have subject matter jurisdiction over a complaint alleging violations of the City's campaign finance disclosure ordinances. *Id.* at 942.

The Court relied on two relevant sources in its conclusion that the City's provisions governed over Article XXVIII and the FCPA. First, the Court referred to the Colorado Secretary of State's rule which provides, "[A]rticle XXVIII and the FCPA do not apply to 'home rule municipalities that have adopted charters, ordinances, or resolutions that address *any* of the matters covered by Article XXVIII or [the FCPA].'" *Id.* at 941

(quoting Campaign & Political Finance Rule 7.1, 8 Code Colo. Regs. 1505–6:7.1) (emphasis in original). The Secretary of State accepts complaints alleging violations of Article XXVIII and the FCPA and forwards them to an ALJ. *Id.* at 940. Notably, the Secretary of State's rules do not require or permit an analysis of the quality or adequacy of the home rule provisions. If *any* of the matters covered in Article XXVIII and the FCPA are addressed by a home rule entity, the entity is exempt. *Id.* at 941.

Second, the Court relied on the Colorado Attorney General's conclusion that Article XXVIII did "not apply to home rule municipalities that have enacted provisions addressing the same subject matter." *Id.* at 941 (citing Op. Atty. Gen. No. 03–1 (Jan. 13, 2003)). The Attorney General determined that "articles XX and XXVIII can be harmonized by construing the local election provisions in article XXVIII as applying only to cities that do not exercise home rule authority." *Id.*

The holding and analysis in *In re City of Colorado Springs* undermines the reasoning and conclusions of the Commission in the Position Statement in numerous ways. First, in *In re City of Colorado Springs,* Article XXVIII and the FCPA did not give home rule entities any additional authority to regulate elections because, as the Court noted, they already had that power pursuant to Article XX, § 6 as a matter of local concern. *See id.* at 939. Rather, the provision in the FCPA stating the "requirements of article XXVIII . . . shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by article XXVIII and this article" was a recognition of the power of home rule entities to govern their own elections. C.R.S. § 1-45-116. Likewise, the similar provision in Article XXIX, § 7 was a recognition by the drafters and the voters that home rule entities have

plenary authority to govern the terms, duties, and standards of conduct of their local officials and employees.

The Attorney General's Opinion relied on by the Court also supports the proposition that that matters addressed in Article XXIX are matters of local concern, and, therefore, only home rule entities that have not legislated *at all* in the areas of ethics or standards of conduct are subject to its terms. Just as the Attorney General determined that "articles XX and XXVIII can be harmonized by construing the local election provisions in article XXVIII as applying only to cities that do not exercise home rule authority," articles XX and XXIX can be harmonized in the same way. *See id.* at 941 (citing Op. Atty. Gen. No. 03–1 (Jan. 13, 2003)).

Next, although the *In re City of Colorado Springs* Court cited the campaign finance provisions of the City, importantly, it did not conduct an analysis of the *quality* of the provisions as the Commission plans to do pursuant to the Position Statement. Citation of the City's provisions in the opinion was necessary merely to establish that the City had legislated in the area. Applying the holding of *In re City of Colorado Springs* supports the Amicus Entities' view that if a home rule entity has legislated in the area of standards of behavior or ethics for local officials and employees *at all*, the Commission has no jurisdiction over the entity. The correct analysis of Article XXIX starts with a determination on the threshold issue: whether a home rule municipality or county has enacted local laws governing ethics. If so, the question of the Commission's jurisdiction is concluded.

Finally, the Secretary of State's role in Article XXVIII and the FCPA is analogous to the Commission's role under Article XXIX. However, unlike the Commission's

Position Statement, the Secretary of State has a clear rule that home rule entities with regulations addressing "*any* of the matters covered by Article XXVIII or [the FCPA]" are not subject to either law. *Id.* at 940 (quoting Campaign & Political Finance Rule 7.1, 8 Code Colo. Regs. 1505–6:7.1) (emphasis in original). If the Secretary of State took the position of the Commission, the Secretary of State would be required to refer complaints against home rule entities under Article XXVIII or the FCPA to an ALJ unless the home rule entity has local laws essentially mirroring Article XXVIII and the FCPA. In addition, if any of the provisions are less stringent than Article XXVIII or the FCPA, the home rule entity bears the burden of justifying those provisions to the Secretary of State. None of these obligations are present in the Secretary of State's rules and, likewise, are not appropriate in the Position Statement. Just as the Court ruled that the Secretary of State did not have subject matter jurisdiction over the City, the Commission does not have subject matter jurisdiction over any home rule official or employee if the entity has in *any way* regulated the standards of conduct of its local officers and employees.

Regulation of the standards of conduct over local officials and employees is a matter of local concern. This home rule authority is no small matter. Article XX § 6 grants strong home rule municipal authority to legislate, regulate, and control the duties of elected officials and employees. Likewise, C.R.S. § 30-35-201(7) does for home rule counties. This positon is supported by *In re City of Colorado Springs.* The electorate of Colorado has long-recognized the value of local control over local matters. It is in the purview of the citizens of home rule entities, not a state commission,[1] to determine whether local ethics provisions adequately address local concerns.

[1] Article 5, § 35 of the Colorado Constitution prohibits the general assembly from delegating to any special commission the power to perform any municipal function.

III. WELD COUNTY HAS EXERCISED ITS HOME RULE AUTHORITY BY ADOPTING ORDINANCE AND CHARTER PROVISIONS THAT "ADDRESS THE MATTERS" COVERED BY ARTICLE XXIX; THEREFORE, THE COMMISSION HAS NO JURISDICTION OVER WELD COUNTY OFFICIALS OR EMPLOYEES.

Article XXIX, § 7 recognizes the authority of home rule entities to govern matters related to ethics and conduct of local officials and employees. Weld County has exercised its authority under C.R.S. § 30-35-201(7) to govern in this area. Specifically, Weld County Code §§ 2-2-150 and 3-3-10A.10 prohibit acceptance of "bribes, money, property or services of value in the course of employment." Exhibit D. Weld County also has other provisions that address standards of conduct for local officials and employees, including that employees "must maintain a standard of conduct and performance which is consistent with the best interests of the County" (Weld County Code § 3-3-10) and conflict of interest prohibitions (Weld County Charter § 16-9). Exhibit D. Therefore, Article XXIX is not applicable to Weld County officials and employees, and the Commission has no jurisdiction over Commissioner Cozad. Complaint 17-28 must be dismissed for lack of jurisdiction.

CONCLUSION

The Position Statement is in conflict with Article XXIX. Article XXIX does not apply to home rule entities with *any* regulations addressing standards of conduct of local officials and employees. Nothing in Article XXIX dictates to what extent the matters must be addressed. The Position Statement exceeds the Commission's jurisdiction under Article XXIX. The Amicus Entities respectfully request withdrawal of the Position Statement and dismissal of Complaint 17-28.

Respectfully submitted this 29th day of November, 2017.

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