

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO 1437 Bannock Street Denver, Colorado 80202		
Plaintiff: NATIONAL FEDERATION OF INDEPENDENT BUSINESS, v. Defendants: SCOTT GESSLER, in his official capacity as Colorado Secretary of State; COLORADO DEPARTMENT OF STATE, and THE STATE OF COLORADO.		
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COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF		

Plaintiff National Federation of Independent Business (“NFIB”), through its counsel, Brownstein Hyatt Farber Schreck, LLP, brings this Complaint against Scott Gessler, in his official capacity as the Colorado Secretary of State (“Secretary”), the Colorado Department of State (“Department”), and the State of Colorado (the “State”) to enforce provisions of the Colorado Constitution.

INTRODUCTION

1. Plaintiff, by and through its members, seeks enforcement of the Taxpayer’s Bill of Rights of the Colorado Constitution, art. X, § 20 (“TABOR”). TABOR provides that “any new tax, tax rate increase . . . or a tax policy change directly causing a net tax revenue gain to any

district” must be approved by a public vote. The State and its departments are a “district” under TABOR.

2. The Secretary is part of the executive branch of the State. Colo. Const., art .4 § 1. Under C.R.S. § 24-1-111(1), the Secretary is the head of the Department. The Department oversees the administration of the State’s elections, registers businesses, maintains records of rules and document filings, and makes collected data available to the public. The Department also regulates lobbyists, notaries public, charitable organizations, and charitable gaming practices. The Department receives no funding from the State’s general fund (“General Fund”), established under C.R.S. § 24-75-201, to carry out its duties.

3. Every year, the Department collects millions of dollars in charges from businesses large and small for filing various, statutorily-required corporate documents. It is the duty of the Department and the Secretary to periodically adjust the charges to approximate the Department’s “direct and indirect costs.” C.R.S. § 24-21-104 (hereinafter “Business Licensing Charges”). Other than the statutory requirement to cover the Department’s direct and indirect costs, the Secretary has complete discretion on how much to charge for each of the charges that make up the Business Licensing Charges.

4. Businesses file approximately 750,000 corporate documents with the Department every year and pay a charge for each filing. Periodic reports are the most common business filings, with 29,000 to 42,000 submitted per month. Currently, the various charges range from \$1 to \$125.

5. The funds collected from the Business Licensing Charges are deposited in the Department’s cash fund (“Cash Fund”), established pursuant to C.R.S. § 24-21-104. In 2013-2014, for example, the Department deposited \$18.69 million into the Cash Fund from the Business Licensing Charges.

6. The total charges collected from businesses has increased every year. For example, for fiscal year 1990-91, the Department collected \$4.19 million, and in fiscal year 2013-2014, the Department collected \$18.69 million, representing an increase of over 400% over that time period.

7. On an annual basis, the Colorado General Assembly appropriates money from the Cash Fund for the Department’s costs and expenses. Of the funds appropriated from the Cash Fund, only a fraction is appropriated to the Business and Licensing Division of the Department. For example, for fiscal year 2014-2015, the General Assembly appropriated 11.8% of the Department’s total appropriation to the Business and Licensing Division. The General Assembly appropriated the rest of the Cash Funds to the Department’s other expenses (hereinafter “General Expenses”), primarily including the Department’s election expenses.

8. As a general legal principle, a fee is intended to defray the costs of a particular government service, while a tax is designed to raise revenues to defray the general expenses of government. Unlike a fee, a tax is subject to TABOR’s vote requirement, while a fee is not.

9. Because a significant portion of the Business Licensing Charges are appropriated to defray the Department's and the State's General Expenses, the Business Licensing Charges are a tax and not a fee.

10. The act of collecting the Business Licensing Charges and appropriating the funds to cover the Department's and the State's General Expenses constitutes a new tax without submitting it to a public vote in violation of TABOR. Plaintiff therefore seeks declaratory and injunctive relief regarding the implementation C.R.S. §§ 24-21-104 and -104.5 and to abate and correct the Secretary's, the Department's, and the State's unconstitutional actions.

JURISDICTION AND VENUE

11. This Court has jurisdiction over Plaintiff's claims under articles VI, section 9, and article X, section 20, of the Colorado Constitution.

12. This Court has the power, pursuant to the Uniform Declaratory Judgments Law, C.R.S. §§ 13-51-101 to 115, to determine questions of statutory construction arising under the provisions of the Colorado Constitution and related statutes applicable to NFIB.

13. Section 13-15-105 of the Uniform Declaratory Judgments Law instructs that "[c]ourts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed . . . such declarations shall have the force and effect of a final judgment or decree." Rule 57(a) of the Colorado Rules of Civil Procedure repeats the same language.

14. Pursuant to C.R.C.P. 98(b)(2), venue is proper in the City and County of Denver for actions against the State of Colorado and the Secretary of State.

PARTIES

15. Plaintiff NFIB is a nonprofit corporation with a principal address of 53 Century Boulevard, Suite 250, Nashville, Tennessee 37214. NFIB's local branch is known as NFIB/Colorado, and located at 1580 Logan St., Suite 520, Denver, Colorado 80203.

16. NFIB is the nation's oldest and largest non-profit national organization dedicated to representing the interests of small-business owners throughout all 50 states, including Colorado. NFIB and NFIB/Colorado are dedicated to protecting and promoting a wide variety of small business interests on behalf of their members. The majority of NFIB members have nine employees or less and gross sales on average of approximately \$350,000 per year.

17. NFIB/Colorado's members have filed corporate documents with the Department and have paid the associated Business Licensing Charges. The members are therefore required to pay unconstitutional taxes levied by the Defendants.

18. The NFIB brings this action on behalf of itself and its approximately 7,000 members in Colorado that have paid the Business Licensing Charges and continue to pay such charges each and every year. NFIB/Colorado members are made up of companies that are

incorporated in Colorado and would otherwise have standing to bring this action in their own right.

19. Neither the claims asserted nor the declaratory relief requested requires the direct participation of members of either NFIB or NFIB/Colorado.

20. Defendant State of Colorado is directly vested with the power to ensure that the laws be faithfully executed. Colo. Const. art. IV, § 2.

21. Defendant Scott Gessler is the Secretary of State and heads the Colorado Department of State as an executive officer of the State of Colorado, pursuant to article IV of the Colorado Constitution.

22. Defendant Department of State is responsible for providing public access to annual reports, articles of incorporation, liens, and other documents filed according to state laws and the Uniform Commercial Code, among other tasks. In this capacity, the Department and the Secretary are responsible for establishing and collecting Business Licensing Charges and for administering the Department's Cash Fund to pay for these services.

GENERAL ALLEGATIONS

I. The Department of State Cash Fund is unconstitutional under TABOR.

23. By law, the Department must adjust the Business Licensing Charges so that the revenue generated from the charges approximate its "direct and indirect costs." C.R.S. § 24-21-104.

24. Specifically, section 24-21-104(3)(b) provides:

The department of state shall adjust its fees **so that the revenue generated from the fees approximates its direct and indirect costs**, including the cost of maintenance and improvements necessary for the distribution of electronic records; except that the department may reduce its fees to generate revenue in an amount less than costs if necessary pursuant to section 24-75-402(3). Such costs shall not include the costs paid by the amounts appropriated by the general assembly from the general fund to the department of state for elections pursuant to section 24-21-104.5. Such fees shall remain in effect for the fiscal year following the adjustment. All fees collected by said department shall be transmitted to the state treasurer, who shall credit the same to the department of state cash fund, which fund is hereby created. All moneys credited to the department of state cash fund shall be used as provided in this section and shall not be deposited in or transferred to the general fund of this state or any other fund. The moneys credited to the department of state cash fund shall be available for appropriation by the general assembly to the department of state in the general appropriation bill or pursuant to section 24-9-105(2). (emphasis added)

25. The Department receives no funding from the State's General Fund and is almost exclusively funded by the Business Licensing Charges. In 2013-2014, for example, the Department deposited \$18.6 million into the Cash Fund, 96% of which was from Business Licensing Charges.

26. Prior to 1983, the schedule for Business Licensing Charges was fixed by statute. For example, the statute authorized the Department to collect five dollars "for filing each body corporate and political document" and "foreign commission." C.R.S. § 24-21-104 (1973). In 1983, the entire statute was repealed and reenacted without a schedule of Business Licensing Charges.

27. Since 1983, the Secretary has had full discretion in setting and adjusting the Business Licensing Charges so long as he or she approximates the Department's direct and indirect costs. According to Department records, Secretary Gessler has adjusted the charges twelve times since he took office in January of 2011, including three "fee holidays" during which he reduced some fees to \$1.00.

28. The Secretary, therefore, has exercised his authority to raise and lower the Business Licensing Charges at his discretion, and can continue to pick and choose which charges to increase and which to lower, so long as the charges "approximate" the Department's indirect and direct costs over time.

II. The Business Licensing Charges fund the Department's and State's general expenses, including its election operations.

29. The Department of State is generally divided into four departments: (1) Administration; (2) Information Technology Services; (3) Elections; and (4) Business and Licensing.

30. The Department's Business and Licensing Division oversees the collection and maintenance of business filings and makes those filings available to the public. The Division also registers business names, trade names, trademarks, and charitable organizations; publishes the Code of Colorado Regulations; licenses entities that engage in charitable gaming; regulates notaries public and administers related law; and registers lobbyists and monitors their filings of required disclosure reports.

31. The Department's Elections Division oversees the administration of the State's elections, including administering statewide statutory and constitutional provisions that relate to elections regarding the preparation and conduct of elections and the initiative and referendum process. The Elections Division also certifies voting equipment, implements the provisions of the federal Help America Vote Act (HAVA), manages the State's Colorado Registration and Elections (SCORE) system, which is the State's computerized statewide voter registration system, and oversees campaign finance reporting by political candidates and committees.

32. For fiscal year 2014-2015, the General Assembly appropriated \$22.1 million to the Department and provided funding for 137.3 full time equivalent staff. In terms of the share for each division, the General Assembly appropriated 22.3% of the Cash Funds to the Elections

Division, 39.9% to Information Technology, and 26% to Administration, and only 11.8% to the Business and Licensing Division.

33. Notably, appropriations to other divisions contribute to the Department's election responsibilities. For example, the Information Technology Division is responsible for maintaining the statewide computerized voter registration database, and for fiscal year 2014-2015, the Department committed five full-time employees in Information Technology to election projects. In reality then, the Department spends a significant portion of its Cash Fund on election-related costs that are not related to the administration of business filing services.

34. Significantly, in addition to using the Business Licensing Charges to cover the State's election related costs, the General Assembly is authorized to appropriate moneys from the Cash Fund to cover the election costs incurred by local governments. C.R.S. § 24-21-104.5.

35. Section 24-21-104.5 provides:

The general assembly is authorized to appropriate moneys from the department of state cash fund to the department of state to cover the costs of the local county clerk and recorders relating to the conduct of general elections and November odd-year elections. If the amount of moneys in the department of state cash fund is insufficient to cover such costs, the general assembly may appropriate additional general fund moneys to cover such costs after exhausting all moneys in the department of state cash fund. **The intent of the general assembly is to authorize the appropriation of department of state cash fund moneys and general fund moneys to the department of state to offset some of the costs of local county clerk and recorders associated with the additional election duties and requirements** resulting from the passage of section 20 of article X of the state constitution and from the increased number of initiatives that are being filed.”

(emphasis added)(hereinafter referred to as “Local Election Appropriation”)

36. Section 24-21-104.5 was enacted in 1996, after the passage of TABOR. As stated in the statute, the intent of the General Assembly was that the Business Licensing Charges be adjusted annually to help cover the costs of local elections, at whatever amount the General Assembly sees fit each year.

III. The Business Licensing Charges are a tax, not a fee.

37. The Business Licensing Charges are not proportionate to the costs of the Department in conducting its duties related to Business and Licensing Division.

38. As such, the Business Licensing Charges are a tax subject to TABOR's vote requirement. Colo. Const. art. X, § 20(4)(a). However, no public vote has been held that

authorizes the Department to collect this tax to defray the Department's general costs and services.

39. Plaintiff NFIB has thousands of Colorado members who have paid the Business Licensing Charges and continue to pay them every year.

40. The benefit these members have received for paying this charge is not proportionate to the charge. Nor do these members receive a benefit for the additional services the Department provides that are financed by the charge, including without limitation the Department's election services.

FIRST CLAIM FOR RELIEF
(C.R.S. § 24-21-104 Violates TABOR)

41. NFIB incorporates herein by reference the allegations set forth above.

42. The Business Licensing Charges are designed to defray the General Expenses of the Department and the State and do not provide a benefit to the business that pay them. The Business Licensing Charges are therefore a tax and not a fee, enacted without voter approval. C.R.S. § 24-21-104 is therefore unconstitutional under TABOR.

43. Plaintiff's members have been forced to pay, and continue to pay, the unconstitutional Business Licensing Charges without a public vote.

44. Plaintiff is therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of C.R.S. § 24-21-104.

SECOND CLAIM FOR RELIEF
(C.R.S. § 24-21-104.5 Violates TABOR)

45. NFIB incorporates herein by reference the allegations set forth above.

46. C.R.S. § 24-21-104.5 authorizes the transfer of Business Licensing Charges to counties for the conduct of their elections. The administration of elections provides no direct benefit for the businesses that pay the Business Licensing Charges. C.R.S. § 24-21-104.5 provides for the unauthorized collection and transfer of a tax without a public vote. C.R.S. § 24-21-104.5 is therefore unconstitutional under TABOR.

47. Plaintiff's members have been forced to pay, and continue to pay, the unconstitutional Business Licensing Charges without a public vote.

48. Plaintiff is therefore entitled to declaratory and permanent injunctive relief against the continued enforcement of C.R.S. § 24-21-104.5.

THIRD CLAIM FOR RELIEF
(Declaratory and Injunctive relief against enforcement of C.R.S. § 24-21-104)

49. NFIB incorporates herein by reference the allegations set forth above.

50. Pursuant to C.R.S. § 24-21-104, the Secretary, acting on behalf of the Department, has discretion to adjust the Business Licensing Charges to approximate the Department's direct and indirect expenses. In so doing, the Secretary sets the Business Licensing Charges at a rate to cover the Department's and State's General Expenses, particularly the Department's Election Division and the Local Election Appropriation.

51. The General Assembly, acting on behalf of the State, appropriates the Business Licensing Charges to cover the Department's and State's General Expenses.

52. Through the Secretary, Department, and General Assembly's collective actions, Plaintiff's members are forced to pay for the Department's and State's General Expenses that are unrelated to costs associated with the Business and Licensing Division.

53. Accordingly, each time the Secretary, acting on behalf of the Department, sets the Business Licensing Charge under C.R.S. § 24-21-104, he violates the Colorado Constitution.

54. Plaintiff is therefore entitled to declaratory and permanent injunctive relief against continued enforcement and maintenance of the Business Licensing Charges to the extent they exceed costs reasonably related to the Business and Licensing Division, until such time as Defendants receive voter approval for the Business Licensing Charges.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor, and against Defendants, and:

- A. Declare C.R.S. §§ 24-21-104 and -104.5 violate Colo. Const. art. X, § 20 and are therefore unconstitutional.
- B. Declare that the Secretary's actions in periodically setting the Business Licensing Charges at amounts that in aggregate exceed the costs reasonably related to the Business and Licensing Division have been, and continue to be, in violation of the Colorado Constitution, art. X, § 20.
- C. Declare that from the date of judgment, the Secretary acting on behalf of the Department, must immediately adjust the Business Licensing Charges to approximate only the costs and expenses reasonably related to the Business and Licensing Division, or until such time as the Defendants comply with the voting requirements of the Colo. Const. art. X, § 20(3).
- D. Permanently enjoin Defendants from adjusting the Business Licensing Charges to cover the Department's expenses beyond those reasonably related to the costs of the Business and Licensing Division, until such time as the Defendants comply with the voting requirements of the Colo. Const. art. X, § 20(3).
- E. Award Plaintiff all applicable penalties, charges, fee and costs in accordance with law, including Colo. Const. art. X, §20(1).

F. Award such other relief as this Court deems just and proper.

Dated December 22, 2014

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