DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO
270 S. Tejon Street
Colorado Springs, Colorado 80901

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**Plaintiff:** DOUGLAS BRUCE,

v.

**Defendant:** THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EL PASO

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Case No. 17CV 156
Courtroom: Division 3

Douglas Bruce
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ANSWER TO MOTION TO DISMISS, and MOTION TO AMEND CAPTION

Plaintiff incorporates here his complaint in this case. He requests the motion be set for oral argument. Plaintiff has requested in discovery defendant furnish two copies of transcripts and audio and/or video records of the Board of County Commissioners meeting that placed ballot issue 1A on the November 2012 ballot. Plaintiff spoke at that meeting and warned the BOCC not to "lowball" its dollar estimate, and explained why. The BOCC raised the first year tax revenue estimate from $16 million to $17 million. Plaintiff told the BOCC and both attorneys Sago and Folsom "by approximately" is illegal and forbidden language to open TABOR (3)(c) ballot titles for tax increases; that warning of explicit violation was contemptuously ignored.

As to jurisdiction, plaintiff accepts defendant's waiver of alleged technical defects

but moves to amend the caption as to the defendant. See above. Plaintiff also stated in his complaint he had demanded compliance in conversation with the county attorney.

Plaintiff agrees with defendant that TABOR litigation is governed by TABOR. However, defendant's claim local voters may exempt a tax increase from full TABOR compliance is breathtakingly specious. That would make TABOR, an amendment to the state constitution, meaningless. The state constitution is not by local option.

The penalty for false financial statements in TABOR (3)(c) was not and cannot be waived by clever lawyers tricking trusting voters. In this Bill of Rights, one specific right is to require government tell voters the truth about government's requested tax increase. It is such a simple, basic request of decency, yet defendant pleads to evade it.

The court should take judicial notice that plaintiff is the author of TABOR. Plaintiff offers to testify to the meaning and intent of the language he seeks to enforce. He could have given governments a "weasel clause" of "good faith." which is easy to allege and impossible to disprove, but he did not. He could have given lying politicians leeway by excusing false statements of up to 5% (here, up to $850,000, which was truly $900,000), but he did not. During the campaign and in later testimony, he told voters and legislators that the only option was to tell the truth. The pending 2012 transcript and disk made that clear to defendant in this case! The BOCC ignored plaintiff's helpful advice.

After the 2013 tax revenue was finalized, Plaintiff told the county attorney, Amy

Folsom, the same one as today, that the county must comply with TABOR (3)(c). Her answer was to invent a “good faith exception” and say that “approximately” protected the county from liability. Note in TABOR (3)(c), the EXACT wording to start all state and local tax increase ballot issues is SPECIFIED IN CAPITAL LETTERS in quotation marks. For 25 years, other governments have complied with that requirement. That wording does not allow linguistic evasions like “by approximately.” It couldn’t be simpler. Defendant’s Argument A on page 3 is circular logic. It says “voters expressly approved an exemption from the revenue and spending provisions of TABOR”. Yes, voters approved a revenue change, as allowed by TABOR, but it was IN THE AMOUNT OF $17 MILLION.” It was not a blank check. That’s why the dollar amount is required to be listed in the election notice and ballot title. As TABOR (7)(d) says, “...voter-approved revenue changes are dollar amounts that are exceptions to, and not part of, any district base.”

The fiscal year spending limit has a base dollar amount after 1991, which grows yearly by inflation plus state population or local growth, plus voter-approved revenue changes. It is a formula that yields a fixed dollar amount, the excess of which is refunded unless voters later allow that government to keep the excess. Defendant knows that, and asked to keep a fixed dollar amount of $15 million excess revenue last November. It could not ask for a specific amount unless FYS was a dollar amount. It cannot be an “approximate” amount.

Literal compliance with that simple requirement began in 1993, the year after TABOR passed, with a state ballot issue to reinstate the expired state sales tax for tourism. Denver District Court ruled in a case brought by plaintiff the ballot title capitalization and wording was mandated literally, verbatim. Defendant here ignored that ruling, despite plaintiff's warning made to them in person. That illegal action was defended by county attorney Amy Folsom and assistant attorney Seago, both of whom plaintiff saw at that meeting. They are trying to rewrite TABOR in order to violate taxpayer protections contained in its Bill of Rights. All commissioners and both attorneys took an oath to obey the state constitution; that oath does not have an expiration date, unlike a quart of milk. This court also took that oath.

State legislative compliance with TABOR is authoritative, nearly conclusive, evidence of the strict construction required. The state complied with TABOR in 1993. It recently complied with the same requirement at issue in this case, TABOR (3)(c), in TWO issues the general assembly put on the ballot in TWO state elections. Both dealt with marijuana taxes. Amendment 64 passed by voters in 2012 was a petition to legalize recreational marijuana. It did not begin with the required ballot title for a tax increase, so the general assembly placed issue AA on a later state ballot. AA had the required language but it gave an incorrect estimate of state fiscal year spending without the tax increase revenue, which is required by TABOR (3)(b)(iii). Because of that violation, referenced in TABOR (3)(c), the general assembly placed another tax increase on the

ballot in a later election. Thus, the general assembly, whose views of constitutional compliance are accorded great weight by the supreme court, honored the first sentence of TABOR (3)(c), the sentence before this court for enforcement. This court cannot shirk its duty to the voters and its own oath of office. It must take judicial notice of these facts.

The state's error in ballot issue AA was to understate fiscal year spending growth. It was forced to obtain "**later** voter approval" to avoid a refund "in the next fiscal year." "Later" obviously does not mean in the same election, the twisted view of defendant. "Next" does not mean many years later; it means the immediately following election. The complaint here makes the same demand on defendant regarding FYS accuracy, as well as accuracy in the tax increase amount. Both figures are required to be truthful. Plaintiff does not see anything in this Motion that addresses the FYS requirement cited in the complaint. This court cannot dismiss the entire complaint based on defendant's lame and partial excuse.

The state supreme court also ruled in Bedford v. Sinclair (1943), a case of textual interpretation of a petition, that "the contemporary evident interpretation of proponents shall be accorded substantial weight" in enforcing a petition. That ruling was affirmed and updated in post-TABOR litigation. The court held what proponents said in campaign statements ("contemporary") in a public ("evident") manner was a strong indicator of the true meaning of the petition text. Plaintiff is prepared to testify what he repeatedly

told voters in media interviews and other public statements during the 1992 campaign was consistent with what he is advocating now—enforcement of TABOR according to its plain meaning. Frankly, no interpretation is required because there is no ambiguity and no alternative explanation of TABOR (3)(c), except in defendant's latest dreams.

The election notice in (3)(b)(iii) requires the "**maximum** dollar amount of each increase and of district fiscal year spending without the increase." (emphasis added) Thus, voters get to decide whether the tax increase is needed, considering the growth of FYS if the tax increase is rejected. They are entitle by law to TRUTHFUL information before voting. "Maximum" means utmost, highest, etc; it does not mean "approximate." The general assembly knew it had no "wiggle room" on the marijuana issues. This court must tell defendant the same thing.

The Acosta case is irrelevant. It challenged entire ballot issues. Here, defendant consciously refused to let citizens re-vote, and now must face the consequences. Both Acosta and Bickel dealt with elections right after passage of TABOR. Issue 1A here was an election 20 years after TABOR. Acosta clerarly made an exception for "intentional wrongdoing," which applies here. Defendant was warned about TABOR (3)(c) before and after the election. Acosta addresses tax revenue gains in years after the first year; TABOR (3)(c) deals only with "the first full fiscal year" of increases.

Defendant's motion concedes on page 4 "any interpretation of TABOR which

would limit the right of the electorate to vote on tax or spending proposals is not favored," citing Havens. That is exactly what defendant is doing here—ignoring the correction of "Except by later voter approval..." Why? The prior phrase opens, "Because voter approval to allow a variation from otherwise applicable limits is **mandated** by TABOR..." (emphasis added). TABOR (3)(c) grants a variation only by voter approval, but defendant refused to hold the corrective election in order to keep its illegal revenue obtained by indisputable voter deception.

Page 4 gets to the gist of defendant's desperate defense. It maintains current voter approval equals "later voter approval." It avers defendant can make false estimates to get "the consent of the governed" for deceptive statements. That is called voter fraud. Defendant cannot get voters to waive their constitutional rights by lying to them; such a waiver is not knowingly, intelligently, freely given. TABOR rejects such subterfuge. One cannot waive what one does not know he has, based on trusting government deception.

Obviously, defendant cannot square its devious tactics with the honest application of TABOR (3)(c) by the general assembly in the marijuana cases. It also asked to keep generated revenue in years AFTER "the first full fiscal year" of collection to clarify the request is not for a one-year tax increase. Defendant says on the top of page 5 it can "lift all revenue and spending limitations contained in TABOR" by a local vote that is not a constitutional amendment. Defendant is shameless in asserting the state constitution its

attorneys and commissioners swore to uphold is but a paper tiger.

Later on page 5, defendant unwittingly makes plaintiff's case, quoting the supreme court as saying "reliance on the ballot language is especially important..." In four "rely" uses in one paragraph, the court evokes the need for trust. That is plaintiff's point. VOTERS must be able to TRUST government to tell THE TRUTH. That is why The Taxpayer's Bill of Rights imposes a clear double penalty for false statements in official documents from the government seeking taxpayer's money. This court can take judicial notice that people will lie to get other people's money. TABOR seeks to prevent that. That is why TABOR is the Taxpayer's Bill of Rights, not the Bureaucrat's Bill of Goods.

On page 6, defendant strikes a noble pose and says it is is "upholding the will of the electorate--" the electorate DEFENDANT DECEIVED. If this court buys a TV for for the advertised price of $400, but the salesman enters a credit card invoice for $500, and keeps the extra $100 for himself, was that transaction "the will of the consumer?"

Just before that nonsense, defendant says (local) voters "specifically removed measure 1A from TABOR's restrictions, including...(3)(c)." **NONSENSE!!** "Later voter approval" does NOT mean current voter approval. PERIOD. Defendant says it relied on the deceptive wording IT wrote and placed before voters! That's chutzpah! TABOR does not give government a license to lie.

On page 6, defendant says lowballing its first year revenue by $900,000 (twice), THEN refusing to correct its false statement using the terms of TABOR (3)(c) is "COMPLYING" with the "**Election provisions**" section of TABOR (!) George Orwell was right; "1984" is here. War is peace, ignorance is strength, and freedom is slavery. Defendant adds "Falsities are Truth." Big Spenders taking $900,000 under false pretenses excuse it as *de minimis*. It doesn't even equal their Donut Fund.

Defendant trots out its unprovable "good faith" defense, even though plaintiff told the BOCC and its attorneys about the risk at a 2012 public meeting, and told the County Attorney again personally after the deception was revealed. Did defendant "in good faith" correct its false statement to voters using TABOR's stated correction device, the fundamental right to vote? No, it accepted no responsibility for its falsehoods. It just kept the money.

Plaintiff knows about bad faith by defendant. He was a county commissioner for El Paso County for three years, 2005-2008. Plaintiff will testify of other "systematic TABOR violations" by defendant, to refute "good faith" and "substantial compliance." Plaintiff does **not** concede those are valid defenses in this case, but plaintiff expects this case to reach the supreme court, which may want to consider all theoretical excuses.

On page 8, defendant <u>concedes</u> "the plain language of TABOR requires 'later voter approval'," but willfully refused to obey that plain language. It admitted it sought

"wholesale exemption from limitation," the paradigm case of bad faith. It did so by a "reasonable interpretation of the exempting language in 1A," language defendant wrote! Such circular reasoning of the meaning of its own words is absurd. Ambiguities are construed against the drafter; that is black letter law. To apply a boilerplate pardon for its own constitutional violation is beyond self-serving. To say seeking "later vote approval" would "serve little purpose" reeks of cynicism and contempt for voters. To say that phrase means current voter approval is beyond dishonest; it is intellectually, legally, and linguistically corrupt pettifoggery. Defendant is convicted of bad faith by its own words. The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare I served this ANSWER and MOTION on January 25, 2018 by emailing it to counsel for defendant Lori Seago at:

loriseago@elpasoco.com

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