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| **SUPREME COURT, STATE OF COLORADO**<br>Colorado State Judicial Building<br>Two E. 14th Avenue, 4th Floor<br>Denver, CO 80203 | |
| Colorado Court of Appeals,<br>Case No. 08CA2552<br>Opinion by Judge Miller; Judges Roy and Furman concur<br><br>District Court, Pitkin County<br>Case No. 07CV175<br>Hon. Gail H. Nichols, District Judge | |
| **Petitioners:**<br>CURTIS VAGNEUR and JEFFREY EVANS,<br><br>**Respondents:**<br>CITY OF ASPEN; KATHRYN KOCH, in her official capacity as City Clerk for the City of Aspen; KAREN GOLDMAN, in her official capacity as Administrative Hearing Officer Pursuant to Section 31-11-110(3), C.R.S. (2009); LES HOLST; CLIFFORD WEISS, and TERRY PAULSON | ▲ **COURT USE ONLY** ▲ |
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| **BRIEF OF *AMICUS CURIAE* COLORADO COMMON CAUSE** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 32 and 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 2,308 words.

The brief complies with C.A.R. 28(a) for the Opening Brief. It contains under a separate heading (1) a table of contents, a table of cases (alphabetically arranged), statutes, and other authorities cited; (2) a statement of the issue presented for review; (3) a statement of the case; (4) an argument, preceded by a summary; and (5) a short conclusion stating the precise relief sought.

HOLLAND & HART, LLP

By: _____
J. Lee Gray
ATTORNEYS FOR AMICUS CURIAE
COLORADO COMMON CAUSE

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## TABLE OF AUTHORITIES

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*Amicus Curiae* Colorado Common Cause ("CCC") hereby submits the following in conjunction with the Opening Brief filed by Petitioners Curtis Vagneur and Jeffrey Evans. Pursuant to C.A.R. 29, this brief is conditionally filed with a motion for leave to file brief of amicus curiae.

## ADVISORY LISTING OF ISSUE PRESENTED FOR REVIEW

*Amicus Curiae* CCC will address the following issue:

Does the determination of whether a proposed initiative is "legislative" or "administrative" in nature turn upon whether passage of the initiative would likely have the effect or consequence of causing future administrative acts to occur and/or negating prior administrative acts?

## STATEMENT OF THE CASE

*Amicus Curiae* CCC adopts Petitioners' statement of the case and statement of the facts set forth in their Opening Brief.

## STATEMENT OF IDENTITY OF *AMICUS CURIAE*

*Amicus curiae* CCC is a state chapter of Common Cause, a national non-profit citizens' advocacy group that works to ensure open, honest and accountable government at the national, state and local levels. Founded in 1970, Common Cause currently has over 300,000 members nationwide and over 7,000 members and supporters in Colorado. Common Cause has long been a supporter and

proponent of the right of citizens to initiate laws across the nation. Citizens, lawmakers, and press have come to rely on Colorado Common Cause for credible, non-partisan information about the initiative right in Colorado and its role in our democracy.

The participation by *amicus* becomes increasingly important depending on whether the issues are of widespread public or narrow private concern and also on the procedural posture and complexity of a case. This lawsuit presents complex issues of great public interest. CCC's expertise on these issues will assist greatly the Court's understanding of the use of the initiative power in Colorado. It is precisely in such cases that participation by *amicus* in providing supplemental legal briefing is most satisfactory.

CCC has a long history of using citizen initiatives to advance reforms for more open and accountable governance and defending the integrity of the initiative process in Colorado. For example, CCC used a citizen initiative to pass Colorado's Sunshine Law (Amendment 9) in 1972. C.R.S. § 24-6-402 (2009). In 1988, CCC led the campaign to draft and pass the "GAVEL" amendment, requiring that all introduced legislation receive a formal public vote, and preventing the practice of binding party caucuses. Colo. Const. art. V, § 20 (Amendment 8, 1988). CCC has also advanced reforms via citizen initiative to

limit the influence of money in politics with the Fair Campaign Practices Act, C.R.S. § 1-45-101 *et seq.* (2009) (Amendment 15, 1996); Colo. Const. art. XXVIII (Amendment 27, 2002), and Colo. Const. art. XXIX (Amendment 41, 2006).

CCC has also led efforts to defend the integrity of the citizen initiative process. In the Colorado Legislature and on the ballot, CCC has worked to defeat policies that would make the initiative process more onerous and prevent meaningful citizen participation, while advocating for policies that would make the process more effective, prevent fraud, and incentivize the use of statutory rather than constitutional amendments. In recent years, CCC has opposed legislation and referenda that would have created significant barriers to the initiative process, including Referendum A (1996) and Referendum O (2008). CCC filed an *amicus curiae* brief in the 10th Circuit Court of Appeals in 2008 in support of comprehensive campaign finance disclosure for all ballot measures. *See Sampson v. Beuscher*, Docket Nos. 08-1389, 08-1415. In 2009, CCC worked with a coalition of organizations to pass HB 09-1326, which addressed concerns about fraud in the initiative signature gathering process. CCC has also advocated for changes to the Blue Book process to ensure that voters receive neutral and factual information about proposed ballot measures.

## SUMMARY OF THE ARGUMENT

Under the appropriate "tests" set forth by this Court for determination of whether a proposed initiative is "legislative" or "administrative," the central inquiry is whether the initiative announces a new or altered public policy or whether it is simply the implementation of a public policy. The fact that an initiative requires administrative action or has administrative consequences does not necessarily make it administrative in nature. Indeed, most public policy initiatives—and legislation passed by the General Assembly—require administrative action for implementation. Such administrative consequences should not be cited as a rationale for finding the initiative administrative in nature and illegible for passage by citizens.

## ARGUMENT

The Colorado Constitution reserves to the people themselves "the power to propose laws and amendments to the constitution." Colo. Const. art. V, § 1. This right to initiate laws extends "to the registered electors of every city, town, and municipality . . . as to all local, special, and municipal legislation of every character in or for their respective municipalities." Colo. Const. art. V, § 1(9). This Court "has always liberally construed this fundamental right" and has "reviewed with the closest scrutiny any governmental action that has the effect of

curtailing its free exercise." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980).

Although liberally construed, the constitutional right of initiative applies "only to acts which are legislative in character." *City of Aurora v. Zwerdlinger*, 571 P.2d 1074, 1076 (Colo. 1977). The determination of whether an initiative is legislative or administrative is largely an *ad hoc* determination. *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1254 (Colo. 1987). The Court of Appeals has held that in this context "*ad hoc*" means "for the particular end or purpose at hand and without reference to wider application or employment." *City of Colorado Springs v. Bull*, 143 P.3d 1127, 1133 (Colo. App. 2006). "The central inquiry is whether the proposed legislation announces new public policy or is simply the implementation of a previously declared policy." *Blackwell*, 731 P.2d at 1254.

In making this central determination, this Court has provided three "tests" as guidance in distinguishing "legislative" from "administrative" acts:

> First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not. Second, acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative. Third, if an original act was legislative, then an amendment to the original act must also be legislative.

*Witcher v. Canon City*, 716 P.2d 445, 449 (Colo. 1986), *citing Zwerdlinger,* 571 P.2d at 1077, *Margolis v. District Court*, 638 P.2d 297, 304 (Colo. 1981).

Here, the Court of Appeals identified and relied upon these tests and cases as the appropriate precedent for making its determination. *See Vagneur v. City of Aspen,*232 P.3d 222, 227 (Colo. App. 2009). The Court of Appeals concluded that the initiatives at issue here were administrative in nature and, therefore, they could not be placed on the ballot as citizen initiatives.[1] But in analyzing the initiatives under the first "test" described above, the Court of Appeals reasoned that because the proposed initiatives would "rescind all inconsistent enactments and authorizations," "reverse a host of administrative actions and decisions made . . . by at least two administrative agencies" and require future amendments to existing contracts, the initiatives were "administrative and not suitable for legislative initiatives." *Vagneur,* 232 P.3d at 228-29.

CCC's concern is that, due to the *ad hoc* nature of this type of determination, this analysis from the Court of Appeals' decision may be

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[1] *Amicus Curiae* CCC takes no position on the merits of the citizen initiatives at issue here or whether these particular initiatives are administrative or legislative in character.

interpreted and cited in future cases to stand for the proposition that any initiative that has post-adoption consequences that are administrative in nature—including necessitating new administrative actions and/or rendering moot or reversing prior administrative actions—is necessarily administrative and unsuitable as a citizen initiative. Such a result is contrary to this Court's long-standing precedent and violates the Constitutional right of the people to bring initiatives to a vote. *See* Colo. Const., art. V, § 1. This Court has repeatedly recognized that public policy concerns that are appropriately decided as citizen initiatives have administrative consequences. *See Witcher*, 716 P.2d at 450 (noting that the public policy of leasing a bridge instead of operating it was appropriately decided by an initiative, while the administrative tasks that were a consequence of the policy, including negotiating leases and amendments were not); *Margolis* , 638 P.2d at 303 ("[W]e have also noted that ordinances establishing general policies, such as a zoning ordinance, even though accompanied by procedures for notice and public hearing, were, when determining the proper procedure for review, legislative in nature ...").

Indeed it is not an uncommon effect and consequence of new legislation (or initiatives) that previous administrative decisions are no

longer valid or require modification, and new administrative actions may be necessary to implement the new legislation. Previous initiatives passed by the citizens of Colorado, including some championed by CCC as set forth above in the Statement of Identity, had such effect and consequence. These administrative effects did not render those historical initiatives administrative in nature and thus not suitable as citizens' initiatives. Similarly, proposing a measure that may require future administrative acts or that abrogates prior administrative acts is not the same as performing those administrative acts. Administrative effects alone do not convert a legislative initiative into an administrative initiative, which is consistent with the analysis and guidance offered by this Court in the *Zwerdlinger, Witcher, and Margolis* cases. Instead, it is when the sole purpose of the proposed initiative relates to administrative action that the initiative is found to be administrative in nature. *Blackwell*, 731 P.2d at 1254 (holding that an initiative that would only exclude a single parcel of land and single structure from serving as the new city hall, instead of affecting the policy decision to fund and build a new city hall, was administrative in nature).

Regardless of whether this Court finds the initiatives at issue here to be legislative or administrative in nature, its decision should make clear that

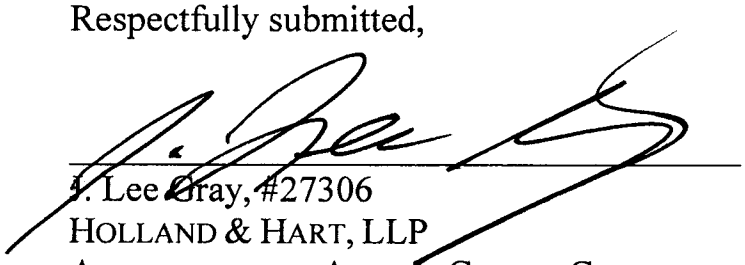
administrative consequences alone do not render an initiative administrative in nature. If the Court of Appeals' decision is allowed to stand without such clarification, it may improperly impede upon Colorado citizens' constitutionally reserved right of initiative.

## CONCLUSION

Based on the foregoing reasoning, *amicus curiae* CCC respectfully requests that the Court make clear in its decision that the determination of whether the initiatives in question are legislative or administrative is based on whether such initiatives declare a public policy, not merely whether any administrative actions or consequences flow from the initiative.

Dated: August 26, 2010

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that on August 26, 2010, I served a copy of the foregoing **SUBMISSION OF AMICUS CURIAE COLORADO COMMON CAUSE** to the following by

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