COLORADO SUPREME COURT 2 East 14th Ave., Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals Case No. 2014 CA 1816 Judges Terry, Bernard, and Rothenberg	
Petitioner: **JANE E. NORTON** v. Respondents: **Rocky Mountain Planned Parenthood, Inc., a/k/a Planned Parenthood of the Rocky Mountains, Inc., a Colorado nonprofit corporation; John W. Hickenlooper, in his official capacity as Governor of the State of Colorado; Susan E. Birch, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; and Larry Wolk, in his official capacity as Executive Director of the Colorado Department of Public Health & Environment**	
Attorneys for amici curiae Michael Francisco, Atty. Reg. #39111 MRDLaw 3301 West Clyde Place Denver, Colorado 80211 303-325-7843 Michael.Francisco@MRD.law	Case Number: 2016SC112

BRIEF OF AMICI CURIAE

FAITH AND FREEDOM COALITION OF COLORADO, FAMILY TALK, DR. JAMES DOBSON, AND THE COLSON CENTER FOR CHRISTIAN WORLDVIEW

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,740 words (does not exceed 4.750 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

____/s____Michael Francisco____

Signature of attorney

Table of Contents

Table of Authorities

Page

Cases

Table of Authorities

Page

Other Authorities

Constitutional Provisions

Interest of Amici Curiae

Faith and Freedom Coalition of Colorado: The Faith and Freedom Coalition of Colorado is a nonprofit corporation representing citizens who seek to advance Christian values in civic life. The coalition's mission includes defending religious liberty and family values, equipping citizens for civic action, and serving as a voice for churches and individuals who share these values.

In particular, the Faith and Freedom Coalition seeks to challenge the abortion industry in Colorado and advocate against any use of taxpayer funds to support the morally reprehensible conduct of Planned Parenthood and other providers of abortion. The group and its members have filed a lawsuit challenging Colorado State University's use of funds in violation of Article V, Section 50 of the Colorado Constitution, which states that no "public funds shall be used by the State of Colorado … to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion …." The coalition seeks to protect life in all forms, including the unborn, and to protect Colorado taxpayers from being forced to fund abortion.

Dr. James Dobson: Dr. James Dobson has been America's trusted expert on the family for over forty years. His original eight-part film series

on the family was seen by over 80 million Americans, one third of the population at the time. He is a psychologist and Christian leader.

Dr. Dobson is the founder and President of Family Talk, a nonprofit ministry that produces his radio program, "Dr. James Dobson's Family Talk." Family Talk provides a host of other services to support and strengthen the family. Dr. Dobson holds seventeen honorary doctoral degrees. He is the best-selling author of more than 30 books dedicated to the preservation of the family, including Dare to Discipline, The Strong Willed Child, and Bringing Up Boys. He has, for decades, been active in governmental affairs and has advised three U.S. presidents on family matters. The New York Times has referred to him as "the nation's most influential evangelical leader."

Dr. Dobson earned his Ph.D. from the University of Southern California in the field of child development. He served as Associate Clinical Professor of Pediatrics at the University of Southern California School of Medicine for fourteen years and was on the attending staff of Children's Hospital of Los Angeles for seventeen years. Dr. Dobson, a resident of Colorado Springs, joins this brief because he supports the rule of law and the fundamental right of citizens through their elected representatives to enact legislation that is good for the family without such legislation being subverted through artificial legal structures.

Family Talk: Family Talk is a Christian non-profit organization headquartered in Colorado Springs, Colorado. Founded in 2010 by Dr. James Dobson, the ministry promotes and teaches biblical principles that support marriage, family, and child-development. Since its inception, Family Talk has served millions of families with broadcasts, monthly newsletters, feature articles, videos, blogs, books, and other resources available on demand via its website, mobile apps, and social media platforms.

Family Talk exists to help preserve and promote the institution of the family and the biblical principles on which it is based, and to seek to introduce as many people as possible to the Gospel of Jesus Christ. Specifically, the focus of the ministry is on marriage, parenthood, evangelism, the sanctity of human life, and encouraging righteousness in the culture.

The Colson Center for Christian Worldview: The Colson Center for Christian Worldview equips people of faith to stand on Christian conviction, understand the culture, and live in such a way as to advance the common good. Among the most central beliefs of Christians is that each and every human life is a distinct, valuable, and special creation of God. Throughout the history of the Christian church, Christians who have lived consistent with this core belief have shown themselves deeply committed to

the intrinsic value and dignity of every human life from the moment of conception to the moment of natural death. This belief has led Christians to protect women and children from exploitation, to seek to end slavery around the world, and to create institutions to care for the sick, the elderly, and the dying.

As such, the Colson Center represents Christians everywhere who find it unconscionable to participate in the taking of innocent human life, such as happens in the practice of abortion. Thankfully, the Colorado constitution protects its citizens of conscience from participating in the funding of abortion. However, because Planned Parenthood, in what amounts to an accounting trick, currently utilizes taxpayer funds to subsidize abortion in direct violation of the Colorado Constitution, we are obligated by our deeply held convictions to join this amicus brief.

Argument

I. The Colorado Constitution prohibits subsidization of abortion through closely related providers.

Amici represent the interests of countless Colorado taxpayers who have a deeply held conviction, enshrined in the Colorado Constitution, to know that their tax dollars are not spent to support elective abortions. The text and purposes of Article V, Section 50 of the Colorado Constitution give voice to these concerns.

A. Colorado citizens have sincere objections to public funds being spent to support abortion, either directly or indirectly.

For at least four decades the use of taxpayer funds to subsidize elective abortions has been the subject of continuous citizen monitoring. Given the religious and moral fervor of those sincerely opposed to the murder of innocent human life via abortion, the conscientious objection to using taxpayer funds for abortion is, perhaps, to be expected.

Colorado, like the United States as a whole, has long embraced a compromise whereby abortion is permitted, *Roe v. Wade*, 410 U.S. 113 (1973), over the religious and moral objection of many citizens but those citizens are not required to participate in providing an abortion or in funding abortions with tax dollars. This compromise, while perhaps unsatisfactory to citizens on both sides of this divisive issue, reflects respect for the religious and moral views of citizens who find abortion to be the unjustified taking of innocent human life.

Amici represent many Colorado taxpayers who find abortion morally reprehensible and who strongly object to any taxpayer funds being used to support abortion. The use of taxpayer funds for abortion services is understood by many Colorado citizens, including amicus curiae's members, as material participation with evil and a violation of sincerely-held religious commitments against the murder of the innocent.

This case is not about the ultimate question of whether abortion is a grave moral evil, or not. It is about the right of sincere taxpayers to know that their tax funds are not being used to support an act they view as morally reprehensible. This case is also not about whether state funds could ever be used to pay Planned Parenthood for non-abortion services; rather it is about whether litigation can proceed to test the Petitioner's allegations that Planned Parenthood has two intertwined corporate entities that operate so closely as to render taxpayer funds to one entity a subsidy of the abortion activities of the other entity. If these allegations are proven as true through the standard litigation process, then courts should enforce the protections of Article V, Section 50. Until that time, all that is necessary is for the Petition to be allowed to proceed beyond the motion to dismiss phase.

B. The Colorado Constitution broadly prohibits funding in support of abortion.

The citizen taxpayers of the state rely on the courts to serve as a check on government spending that transgresses the limits set by the constitution. The decision below abdicates this duty and allows the government to spend taxpayer funds to support abortion providers, either directly or indirectly, without so much as a trial to test the alleged facts. By sanctioning the use of taxpayer funds in direct contravention of the Colorado Constitution, the courts below allow the ongoing violation of the Colorado Constitution and

undermine the confidence of citizens that their government will abide by the terms of the Colorado Constitution.

First, the Colorado Constitution empowers taxpayers to prevent government misuse of taxes. Colorado embraces a critical role of taxpayers in monitoring government spending for constitutional compliance. Unique to the Colorado system of government, taxpayers are empowered to police government expenditures in violation of constitutional standards, as "taxpayers have standing to seek to enjoin an unlawful expenditure of public funds." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995). This principle is true even when "no direct economic harm is implicated" as there is a citizen "interest in ensuring that governmental units conform to the state constitution." *Id.* This form of taxpayer standing has been aptly described as "broad," *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004), and contrasts with narrow federal doctrine of taxpayer standing. *Compare Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (explaining that "[a]bsent special circumstances ... standing cannot be based on a plaintiff's mere status as a taxpayer"), *with Ainscough*, 90 P.3d at 856. Taxpayers must show a "clear nexus" between the challenged conduct and the status as taxpayer, a requirement easily satisfied in this case where the challenged conduct is the funding of abortion. *See generally,*

Hickenlooper v. Freedom from Religion Found., Inc., 38 P.3d 1002, 1008 (Colo. 2014).

Governmental violations of constitutional provisions are understood to create an injury-in-fact sufficient to allow a taxpayer to request adjudication from the courts. *See, e.g.*, *Conrad v. City & County of Denver*, 656 P.2d 662, 668 (Colo. 1982) (describing injury in fact); *see also Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008).

The respondents have not challenged Mrs. Norton's standing as a taxpayer to challenge the government spending at issue here. With undeniable standing to challenge the use of government funds in violation of Article V, Section 50, this litigation should be allowed to proceed to the merits where the State's factual assertions can be properly tested and weighed against the prohibition of Section 50.

Second, the limitations on government spending in Section 50 should be given the same purchase as other Colorado Constitution funding limitations. Colorado has many restrictions on government use of taxpayer funds, including the frequently litigated Taxpayers Bill of Rights in article X, section 20. *See, e.g.*, *Mesa County Bd. of County Comm'rs v. Colorado*, 203 P.3d 519 (Colo. 2009) (challenge to government spending under Article X, Section 20); *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2016) (challenging use of funds under article IX, section 7);

Colo. Const. art. X, § 21 (tobacco funding); Colo. Const. art. XVII (public indebtedness); Colo. Const. art. XI, § 3 (balanced budget). Colorado courts enforce these restrictions, and many others, as an important check on government spending. The defendants contend, as to the *Taxpayers for Public Education* decision, that the language in Article IX, Section 7 is materially broader and different than the language in Article V, Section 50. This misses the point; both provisions use broad language and it would be error to apply the former broadly and the latter narrowly, effectively reading "indirectly" out of the law.

The case below seeks to enforce a longstanding restriction on the use of government funds for abortion and it should be likewise allowed to proceed to the merits to determine if, as alleged, the government has spent funds indirectly for the performance of an induced abortion in violation of Article V, Section 50.

Third, the court of appeals' embrace of a payor-purpose limitation in Section 50, affirmed by both defendants, contradicts the plain meaning of the constitutional text. "[C]onstitutional provisions must be declared and enforced as written" whenever their language is "plain" and their meaning is "clear." *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005). Section 50 states:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion….

Interpreting this provision, the court of appeals rejected the claims that public money was being used to indirectly fund abortions because the State lacked a "purpose" of funding an induced abortion when it contracted with one of the two interrelated Planned Parenthood entities. The court of appeals reasoned that state funds sent to one Planned Parenthood entity could never violate this provision so long as the State did not have an express purpose that the payment be used to fund abortion (even if, ultimately, the funds were used by Planned Parenthood to pay for or subsidize the performance of induced abortions.). The court rejected Mrs. Norton's contention that paying public funds to the Planned Parenthood conglomerate would result in spending on induced abortions because the court found even "indirect" funding would comply with the constitution so long as it lacked an express government purpose to fund abortion.

Attempting to justify its narrow reading of Article V, Section 50, the lower court relies on the inauspicious preposition "for" as a vessel containing a substantial limiting principle. This over-reading of a preposition violates this Court's guidelines for applying the plain language of constitutional provisions. There is no legal authority for erecting such a stark limitation from the word "for." BLACK'S LAW DICTIONARY lacks an

entry defining "for." The court of appeals offers no definition or authority for its expansive understanding of the word. Never before has a preposition done so much work in the Colorado Constitution.

This over-use of the common and inconsequential preposition becomes even weaker when the specific language earlier in Section 50 covering all uses of government funds "directly or indirectly" is considered. The clear intent of Section 50 was to prohibit not just "direct" spending on induced abortion, but "indirect" spending. By reading "for" as requiring the spending be "*for the purpose of* compensating someone for performing an induced abortion," the court below effectively eliminated the indirect spending reach of the prohibition. 2016 COA 2, ¶ 2 (emphasis original). Logically, if "for" is interpreted to require a direct, intentional purpose behind spending, there is no meaning added by the word "indirectly" in Section 50. Unlike the "purpose" requirement, frequently italicized by the court of appeals to signal its importance, the prohibition on "indirectly" spending comes from the text of Section 50.

Consider, if there is a purpose requirement, as argued by the defendants, then it would be virtually impossible to conceive of a violation of the "indirectly" portion of the law. How would the state ever indirectly pay or reimburse for a service *for the purpose of* something only done directly?

A more natural reading of the language "for" is to describe the result of the state funding that is to be avoided; it does nothing to limit the operative text of the limitation, "no public funds shall be used … to pay or otherwise reimburse, either directly or indirectly…" The intent behind the state funds, to the extent it can be known, is simply irrelevant.

The court of appeals went so far as to opine that "Section 50 does not address what the funds ultimately may be used for by the payee after the State pays the fund" and thus the provision is "focused on the actions of the payor and not what is done with the funds after they have been received by the payee." *Norton v. Rocky Mountain Planned Parenthood*, 2016 COA 3, ¶¶ 22, 23 (Colo. App. 2016) (emphasis original). The intentionally broad language of Section 50, and this Court's application of the purpose of Section 50, runs contrary to the lower court's limiting interpretation whereby the use of government funds for the "performance of an induced abortion" plays no role in determining if a government expenditure satisfies the demands of Section 50.

C. This Court's prior abortion funding decisions support an interpretation of Article V, Section 50 that can reach subsidization schemes.

The people of Colorado adopted Article V, Section 50 likely in response to the judicial branch's lack of oversight over spending tax dollars on abortion services. In 1979, this Court decided the seminal decision of *Dodge*

v. Department of Social Services, 600 P.2d 70, 70 (1979) where it found taxpayer standing to challenge the use of government funds on abortion services without the required appropriation. On remand, the lower courts found the use of taxpayer funds did not violate the appropriation provision in Article V, Section 33, and thus allowed the use of government funds for abortion services to continue. *Dodge v. Dep't of Soc. Servs.*, 657 P.2d 969 (Colo. App. 1982). Shortly thereafter, the people initiated Amendment 3, voting in favor of an express constitutional provision preventing the use of taxpayer funds for abortion services in 1984. The objection to funding abortion, directly or indirectly, with taxpayer funds has a long pedigree in Colorado and should be allowed to proceed to the merits, just as the *Dodge* case was allowed to proceed.

The State defendants argue the context of the *Dodge* decision proves that Article V, Section 50 was simply meant to adopt a state analogue of the Hyde Amendment in federal law. But the Hyde Amendment language has never been as broad as what the Colorado taxpayers adopted. *See, e.g.*, Pub. Law 111-8, § 202 (2009) ("none of the funds … shall be expended for any abortion."). The better understanding of the context affirms the intention of the voters to adopt a broad restriction on taxpayer support of abortion, regardless of the mechanism of scheme for the use of taxpayer funds to support abortion.

This contextual understanding is bolstered by this Court's only opportunity to interpret Article V, Section 50, where it affirmed the purpose of the section "[t]aken as a whole" was "that no induced abortion shall be paid for by public funds unless necessary to prevent the death of a pregnant woman and unless every reasonable effort also has been made to preserve the life of the unborn child." *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988). While *Urbish* dealt with a direct funding claim, not indirect funding, the interpretation and articulation of the purpose behind Article V, Section 50 in that decision is fully consistent with Mrs. Norton's claims.

The defendants and courts below have clouded the clear purpose of Section 50 by creating a distinction between the intention of the State in paying funds and the "use" of the funds by the recipient. That limiting interpretation cannot be squared with this Court's decision in *Urbish*.

II. This Court can, and should, adopt a neutral and generally applicable interpretation of Article V, Section 50.

The people of Colorado enshrined the principle of not forcing taxpayers to fund abortion by adopted a broad constitutional amendment. Colo. Const. art. V, § 50. The court of appeals below, by dismissing Mrs. Norton's claim, renders the provision adopted by the people of Colorado, toothless.

A. The personnel involved in this appeal should not detract from a straightforward application of the constitutional funding limitation.

While Mrs. Norton has a detailed history with the application of this provision, any Colorado taxpayer has a right to challenge the government expenditure of funds in violation of Article V, Section 50. The Petitioner has exercised her right, common to all other Colorado taxpayers, to enforce the limitations of the constitution on how certain taxpayer funds are spent.

For this reason, it would be a mistake to affirm the court of appeals decision on account of the particular relationship of the Petitioner to the Colorado Department of Public Health and Environment report which exposed Planned Parenthood's efforts in Colorado to use two closely related corporate entities to perform elective abortions while maintaining a "clean" front for receipt of public funds that could be used to subsidize the closely affiliated entity for performing elective abortions. Again, the Petitioner has a strong interest in this case, but the core legal question will reach far beyond the parties to this case.

B. The procedural posture of the appeal requires only a limited holding to allow the Petitioner to litigate and attempt to prove the merits of the case.

Both the State defendants and Planned Parenthood defendants make much of the lower court's claim that Mrs. Norton did not allege direct payment for abortions. The argument then characterizes the Complaint as

raising only a "subsidization theory" for interpretation Article V, Section 50, implying any such subsidization would be perfectly legal in any event. There are two flaws with these arguments.

First, the defendants put the cart before the horse. If Article V, Section 50 is rightly interpreted as giving meaning to the restriction against "indirectly" paying or otherwise reimbursing for abortions, then surely some form of subsidy for abortions would violate the law. In other words, Mrs. Norton's subsidization allegations, if proven true in litigation, were entirely sufficient to state a claim so long as the courts do not judicially rewrite the law to take out the restriction applying to "indirect" support. The legal issue raised by this appeal is whether the Colorado Constitution does, in fact, prevent indirect taxpayer funding schemes, such as the alleged closely related corporate shell entities where the landlord entity, supported by taxpayer funds, provides substantially below market "rent" to the abortion providing entity, thereby providing indirect payment for abortions. That Mrs. Norton focused on the so-called subsidy between the two closely related Planned Parenthood corporate shells is no reason to dismiss the claim. It is reason to allow litigation to proceed beyond the motion to dismiss stage.

Second, because this case did not proceed beyond the motion to dismiss phase, the Court need not decide the harder questions about how much

subsidization is too much, or which schemes for using taxpayer funds in closely held entities constitutes an indirect payment or reimbursement for abortions. Mrs. Norton will still need to prove the allegations in the Complaint, and only after litigation has proceeded in the normal course will a lower court be faced with deciding the next level questions about whether a certain relationship between Planned Parenthood and state tax dollars and abortion violate Article V, Section 50.

All that is required to preserve the protections of Article V, Section 50 in this case is to reverse the court below and allow the case to be litigated. If the facts can be proven, then the courts will have the opportunity to flesh out in more detail how the restrictions work in practice.

Conclusion

The court of appeals' opinion should be reversed.

DATED: December 28, 2016

MRDLaw

_____/s_____

Michael Francisco

ATTORNEY FOR AMICI CURIAE

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **Brief of Amici Curiae the Faith and Freedom Coalition of Colorado, Family Talk, Dr. James Dobson, and Christian Coalition of Colorado** upon the following parties or their counsel electronically via ICCES, or via electronic mail, on this 28th day of December 2016, addressed as follows:

Attorney for Petitioner:
Michael J. Norton
Colorado Freedom Institute
P.O. Box 3008
Greenwood Village, CO 80155

Attorneys for Colorado Government Defendants
Cynthia H. Coffman, Esq.
W. Eric Kuhn, Esq.
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Attorneys for Planned Parenthood
Kevin C. Paul, Esq.
Dean C. Heizer, Esq.
Edward T. Ramey, Esq.
Martha M. Tierney, Esq.
Cynthia A. Coleman, Esq.
Heizer Paul Grueskin LLP
2401 15th Street, Suite 300
Denver, CO 80202

s/ Michael Francisco