DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202 (303) 606-2300	DATE FILED: April 29, 2024 9:48 AM CASE NUMBER: 2022CV30971
Plaintiff: AMERICANS FOR PROSPERITY, MICHAEL FIELDS; RICHARD ORMAN; AND JERRY SONNENBERG v. Defendants: STATE OF COLORADO; GOVERNOR JARED POLIS; DEPARTMENT OF REVENUE; STATE CONTROLLER ROBERT JAROS; COMMUNITY ACCESS ENTERPRISE; CLEAN FLEET ENTERPRISE; CLEAN TRANSIT ENTERPRISE; NONATTAINMENT AREA AIR POLLUTION MITIGATION ENTERPRISE; AND STATEWIDE BRIDGE AND TUNNEL ENTERPRISE	**▲COURT USE ONLY▲** Case Number: 2022CV30971 Division: 414

ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on Defendants' Motion for Summary Judgment, filed on February 5, 2024 ("Motion"), Plaintiffs' Response, filed on March 11, 2024 ("Response"), and Defendants' Reply, filed on April 1, 2024 ("Reply"). Defendants attached three (3) exhibits in support of their motion. Exhibit A is the Declaration of Michael Fields in Support of Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment. Exhibit B is the deposition of Michael Fields, dated January 16, 2024. Exhibit C is the State of Colorado Schedule of

Computations Required Under Article X, Section 20 as of June 30, 2006. Plaintiffs attached two (2) exhibits in support of their Response. The first of which is the Declaration of Will Toor, the Executive Director of the Colorado Energy Office, dated January 31, 2024. The second document is the Declaration of Jeffrey Kahn, the Director of Financial Reporting and Analysis at the Colorado Office of State Controller, dated February 2, 2024.

THE COURT, having reviewed the Motion, the responsive briefs, the associated exhibits, the Court file, the applicable legal authority, and being otherwise fully advised in the premises, HEREBY FINDS, CONCLUDES, and ORDERS as follows:

BACKGROUND

This case stems from a dispute over whether the General Assembly's passage of a transportation sustainability bill complies with the mandates of the Colorado Taxpayer's Bill of Rights ("TABOR"). Colo. Const. art. § 20. On April 7, 2022, Plaintiffs Americans for Prosperity, Michael Fields, Richard Orman, and Jerry Sonnenberg (collectively, "Plaintiffs") filed a Complaint against Defendants the State of Colorado; Governor Jared Polis; Department of Revenue; State Controller Robert Jaros; Community Access Enterprise; Clean Fleet Enterprise; Clean Transit Enterprise; Nonattainment Area Air Pollution Mitigation Enterprise; and Statewide Bridge and Tunnel Enterprise (collectively, "Defendants"), asserting four (4) claims for relief.[1]

In their Complaint, Plaintiffs ask this Court to (1) declare that S.B. 21-260 violated Section 108 or, in the alternative, the Colorado Constitution, (2) to enjoin the enterprises at issue from operating or charging or collecting any fees until such enterprises are approved at a statewide general election, (3) to enjoin the Colorado Department of Revenue from collecting any fees for,

[1] The authoring judge was assigned responsibility for this matter on January 23, 2023, following taking his judicial oath on January 20, 2023.

or transferring any funds to, the enterprises until such enterprises are approved at a statewide general election, (4) order the State of Colorado and Defendant Jaros to adjust the revenues cap downward by an amount equal to the aggregate of the expected first-year revenue of the enterprises at issue, (5) strike the increase of the Referendum C cap from S.B. 21-260, (6) in the alternative, set aside S.B. 21-260 in its entirety, and (7) grant fees, costs and interest as allowed by law and any other just and equitable relief.

In 1992, the voters of Colorado adopted TABOR, which requires voter approval for "any new tax, tax rate increase, . . . or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a). TABOR also set limits on the amount of revenue the state may collect and spend per fiscal year, adjusted annually for inflation and population growth, and required refunds of revenue exceeding the spending limit. *Id*., § (7)(a) and (d).

In 2005, Colorado voters adopted a referred measure, known as Referendum C, which provided a five-year "timeout" from the application of the spending limits under TABOR. § 24-77-103.6 (1)(a), C.R.S. (2005). Pursuant to Referendum C, a new "excess state revenues cap" was established as the new limit on state revenues and the trigger for refunds under TABOR. This new cap was to be based upon the highest total annual revenues the state collected between 2005 and 2010. C.R.S. § 24-77-103.6(1)(b) and -103.6(6)(b)(I)(B).

On June 17, 2021, Senate Bill 21-260 was enacted by the General Assembly and signed into law. CO Legislature, 73rd Gen Assembly. 1st Sess. S.B. 21-260, *An Act Concerning The Sustainability Of The Transportation System In Colorado.* (June 17, 2021). Available at https://leg.colorado.gov/bills/sb21-260; accessed April 19, 2024. The General Assembly passed S.B. 21-260 with the stated purpose that "[t]he current and future health and prosperity of the state

and its growing number of citizens requires the planning, funding, development, construction, maintenance, and supervision of a sustainable transportation system." S.B. 21-260, § 1.

S.B. 21-260 authorized the creation and funding of a community access enterprise, a clean fleet enterprise, a clean transit enterprise, and a nonattainment area air pollution mitigation enterprise. S.B. 21-260, § 1. It also expanded the scope of the existing statewide bridge enterprise to include both designated bridge projects and surface transportation infrastructure projects for tunnels, renaming it the statewide bridge and tunnel enterprise. S.B. 21-260, § 48. S.B. 21-260 details how the five enterprises are charged with implementing different components of the scheme, which can be summarized as follows:

> (1) The community access enterprise was "created to serve the primary business purpose of equitably reducing and mitigating the adverse environmental and health impacts of air pollution and greenhouse gas emissions produced by motor vehicles used to make retail deliveries to consumers within local communities."
>
> (2) The clean fleet enterprise was created to serve the primary business "purpose of reducing and mitigating the adverse environmental and health impacts of air pollution and greenhouse gas emissions produced by the increasing number of fleet motor vehicles being used to provide transportation network company rides and make retail deliveries by supporting the electrification of such fleets and other motor vehicle fleets, and the enterprise will support the electrification of motor vehicle fleets and pursue its primary business purpose by, at a minimum, providing funding or financing…."
>
> (3) The clean transit enterprise was crafted for the "primary business purpose of mitigating the environmental and health impacts of increased air pollution from motor vehicle emissions in nonattainment areas that results from the rapid and continuing growth in retail deliveries made by motor vehicles and in prearranged rides provided by transportation network companies by providing funding for eligible projects that reduce traffic, including demand management projects that encourage alternatives to driving alone or that directly reduce air pollution, such as retrofitting of construction equipment, construction of roadside vegetation barriers, and planting trees along medians."
>
> (4) The nonattainment area air pollution mitigation enterprise was "created to serve the primary business purpose of mitigating the environmental and health impacts of increased air pollution from motor vehicle emissions in nonattainment areas that

> results from the rapid and continuing growth in retail deliveries made by motor vehicles and in prearranged rides provided by transportation network companies by providing funding for eligible projects that reduce traffic, including demand management projects that encourage alternatives to driving alone or that directly reduce air pollution, such as retrofitting of construction equipment, construction of roadside vegetation barriers, and planting trees along medians."
>
> (5) The bridge and tunnel enterprise was "authorized to complete designated bridge projects and tunnel projects, to impose a bridge safety surcharge and a bridge and tunnel impact fee and issue revenue bonds, and, if required approvals are obtained, to contract with the state to receive one or more loans of moneys received by the state under the terms of one or more lease-purchase agreements authorized by this part 8 and to use the revenues generated by the bridge safety surcharge and the bridge and tunnel impact fee to repay any such loan or loans, will improve the safety and efficiency of the state transportation system by allowing the state to accelerate the repair, reconstruction, and replacement of structurally deficient, functionally obsolete, and rated as poor bridges and repair, maintain, and more safely operate tunnels."

S.B. 21-260, §§ 1; 44.

STANDARD OF REVIEW

Summary judgment under C.R.C.P. 56 is a drastic remedy and should be granted only if it has been clearly established that the moving party is entitled to a judgment as a matter of law. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 225 (Colo. 2001). The court may grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999). The court may not grant summary judgment when pleadings and affidavits show material facts in dispute. *GE Life & Annuity Assurance Co. v. Fort Collins Assemblage, Ltd.*, 53 P.3d 703, 706 (Colo. App. 2001).

A material fact is one that will affect the outcome of the case. *Struble v. American Family Ins. Co*, 172 P.3d 950, 955 (Colo. App. 2007); *Krane v. St. Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo. App. 1987). The moving party has the initial burden of showing no genuine issue of material fact exists; the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). If the moving party meets its burden, the non-moving party must set forth specific facts demonstrating the existence of a real controversy. C.R.C.P. 56(e). To survive summary judgment, the non-moving party must present evidence sufficient to demonstrate that a reasonable jury could decide in its favor. *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007). The party opposing the motion for summary judgment cannot rely on the mere allegations of its pleadings, but must, by affidavit or otherwise as provided in C.R.C.P. 56, set forth specific facts showing a genuine issue of material fact. *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008) (citations omitted). The court will "view all evidence properly before [it] in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party." *Wilson v. Prentiss*, 140 P.3d 288, 290 (Colo. App. 2006).

ANALYSIS

Defendants argue that they should be granted summary judgment on all of Plaintiffs' claims for four reasons: (1) Plaintiffs have not demonstrated as a matter of law that simultaneously-created enterprises must be aggregated for the purposes of Section 108, regardless if they serve primarily the same purpose; (2) Plaintiffs cannot demonstrate as a matter of law that S.B. 21-260 violates the single subject rule because "purposes" and "subjects" are not analogous and, here, the subject of S.B. 21-260 is the "sustainability of the transportation system in Colorado," and the

enterprises serve different purposes in trying to achieve that subject; (3) in the alternative, even if S.B. 21-260 violates Section 108, that section is a statute the Colorado General Assembly has the power to override as a previously passed statute if it wishes to do so, and the Court should consider the legislature's intent when determining whether S.B. 21-260 violated Section 108; and (4) that the increase to the excess state revenues cap is permissible as it reverts to a prior, voter-approved limit, and that Plaintiffs cannot demonstrate as a matter of law that the measure's inclusion in S.B. 21-260 does not run afoul of the single subject requirement.

This case raises constitutional and statutory challenges to the creation of new sources of funding and new state enterprises enacted by S.B. 21-260 relating to Colorado's transportation system. Statutes are entitled to a "heavy presumption of constitutionality" which can be overcome "only if it is shown that the enactment is unconstitutional beyond a reasonable doubt." *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008). No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. Colo. Const. art. V, § 21. The purposes of this provision are: (1) to notify the public and legislators of pending bills so that all may participate in the legislative process; (2) to guarantee that each legislative proposal passes on its own merit; and (3) to enable the governor to consider each piece of legislation separately in determining whether to exercise veto power. *Ward v. State by & through Polis*, 534 P.3d 107, 113 (Colo. 2023) (*citing Parrish v. Lamm*, 758 P.2d 1356, 1362 (Colo. 1988)). The single subject requirement is construed "liberally and reasonably" in order "to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation." *Id*. These evils include (1) joining in one act

disconnected and incongruous matters; (2) passing unknown subjects coiled up in the folds of the bill; and (3) surprising or defrauding legislators and the people in the enactment of laws. *Id.*

"The principal purpose of TABOR is to limit the spending and taxing power of state and local governments." *Bd. of Comm'rs of Cty. of Boulder v. City of Broomfield*, 7 P.3d 1033, 1037 (Colo. App. 1999), *as modified on denial of reh'g* (Dec. 23, 1999). In pursuit of that purpose, TABOR "requires that 'districts' hold elections to obtain voter approval in advance for increases in taxes, spending, and direct or indirect debt." *Olson v. City of Golden*, 53 P.3d 747, 753 (Colo. App. 2002) (citing Colo. Const. art. X, § 20). The constitutional amendment defines "district" as "the state or any local government, excluding enterprises." Colo. Const. art. X, § 20(2)(b). It further defines an "enterprise" as a "government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. art. X, § 20(2)(d).

I. First Claim for Relief

In their first claim for relief, Plaintiffs contend that S.B. 21-260 violates Section 24-77-108 of the Colorado Revised Statutes ("Section 108"), which was adopted into law through a voter initiative known as Proposition 117 in 2020. Section 108 affects newly created or qualified enterprises in several critical ways. Section 108 provides, in pertinent part, as follows:[2]

> In order to provide transparency and oversight to government mandated fees the People of the State of Colorado find and declare that:
>
> (1) After January 1, 2021, any state enterprise qualified or created, as defined under Colo. Const. art. X, section 20(2)(d) with projected or actual revenue from fees and surcharges of over $100,000,000 total in its first five fiscal years must be approved at a statewide general election. Ballot titles for enterprises shall begin, "SHALL

[2] The Court agrees with Plaintiffs that the pertinent language at issue in this case comes from the version of C.R.S. § 22-77-108, which was in effect at the time of S.B. 21-260's enactment.

> AN ENTERPRISE BE CREATED TO COLLECT REVENUE TOTALING (full dollar collection for first five fiscal years) IN ITS FIRST FIVE YEARS ... ?"
>
> (2) Revenue collected for **enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated** in calculating the applicability of this section.

C.R.S. § 24-77-108 (2021) (emphasis added). Plaintiffs argue that: (1) S.B. 21-260 violates Section 108 because the bill created the five enterprises "simultaneously" and, therefore, the revenue from those enterprises must be aggregated under Section 108; (2) the "projected five-year aggregate revenue to be raised by the new fees and surcharges to these five enterprises far exceeds $100 million"; and (3) Section 108's requirement that the enterprises be approved at a statewide general election, and since no election was held, S.B. 21-260 violated the statute.

In their Motion, Defendants argue that summary judgment should be granted as to this claim because Section 108 should be read to provide that, even if enterprises are created simultaneously, they still do not qualify for aggregation for the purposes of Section 108 if they do not serve primarily the same purpose. They argue that the enterprises at issue here serve different but related business purposes and, therefore, their revenue need not be aggregated under the statute. Plaintiffs, argue, in the alternative, that even if simultaneously-created enterprises need to serve primarily the same purpose in order to qualify for aggregation, they must in this case do so, or S.B. 21-260 would violate the constitutional single subject requirement. Defendants further argue that even if S.B. 21-260 violates Section 108, "the legislature has unfettered authority to pass any

statute, subject only to constitutional limitations," and, therefore, the passage of the bill repealed any conflicting portion of Section 108 by implication.[3]

Put differently, the parties raise three issues related to S.B. 21-260's enterprises. First, Plaintiffs argue that S.B. 21-260 created five new enterprises "simultaneously" and, as a result, their projected and actual revenues must be aggregated regardless of their purpose. They argue that this aggregated amount exceeds the $100 million dollar cap set by Section 108(2), which triggers the requirement that the enterprises be approved by voters in a statewide general election. Because no election was held, Plaintiffs allege that S.B. 21-260 violates Section 108. Second, Plaintiffs argue that even if aggregation is not required because the enterprises do not "serv[e] primarily the same purpose," then S.B. 21-260 is unconstitutional because it violates the constitutional single subject rule. Third, Defendants respond that even if S.B. 21-260 violates Section 108, "the legislature has unfettered authority to pass any statute, subject only to constitutional limitation," and therefore, the passage of the bill repealed any conflicting portion of Section 108 by implication.

A. Section 108 does not require aggregation of the enterprises' revenue established under S.B. 21-260

The parties agree that S.B. 21-260 created at least four new enterprises when it was passed in 2021. Compl. at 5-6; Reply at 4-6. Each enterprise was authorized to collect certain fees under S.B. 21-260 at the start of the following fiscal year (2022-23). *See, e.g.*, C.R.S. §§ 40-10.1-118(b); 43-4-217(3)(a); 43-4-218(3). The parties do not dispute that the aggregate amount of the

[3] Defendants also argue that S.B. 21-260 only "created" four enterprises and expanded the previously existing Bridge Enterprise, and therefore, Section 108's provisions do not apply to that new enterprise. In light of the Court's ruling, it need not address this dispute between the parties.

enterprises' revenues is projected to exceed $100 million during the first five years. Ex. A, at ¶ 11-12; Compl. at 10; Reply at 4.

The Court begins its analysis with the relevant constitutional and statutory language. *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 867 (Colo. 1995). The text of Section 108 at issue provides that "[r]evenue collected for enterprises **created simultaneously or within the five preceding years serving primarily the same purpose** shall be aggregated . . .." C.R.S. § 24-77-108(2) (emphasis added). This sentence uses the word, "or" which results in the disjunctive clause "within the five preceding years" followed by "serving primarily the same purpose."

Plaintiffs interpret the phrase "serving primarily the same purpose" to apply only to the clause "created in the five preceding years." Resp. at 8-9. The phrase "created simultaneously" stands alone, because "it would be redundant to state that enterprises created in the same bill must serve primarily the same purpose in order to have their revenues aggregate. . .." As a result, Plaintiffs argue that the revenues generated by the enterprises under S.B. 21-260 must be aggregated because they were created "simultaneously," regardless of whether "they serve the same purpose." In contrast, Defendants read "serving primarily the same purpose" to modify the word "enterprises." Mot. at 12. They assert that aggregation applies to enterprises that (1) are "created simultaneously or within the five preceding years" and that (2) serve "primarily the same purpose." *Id*. Therefore, Defendants argue aggregation is required only when both of those factors are met.

The Court has not found any case law that directly resolves this issue; and the text of Section 108 does not compel a finding in support of either party. For example, Section 108(2) could have been written: *revenue collected for enterprises serving primarily the same purpose*

shall be aggregated if they are created simultaneously or within the five preceding years. In such a situation, the language would more strongly support Defendants' position, because the clause "serving primarily the same purpose" modifies the word immediately before it – "enterprises." That is not the case here. Because both parties present reasonable, competing interpretations, the Court finds that the plain language of Section 108(2) is ambiguous. *People In Int. of O.C.*, 308 P.3d 1218, 1221 (Colo. 2013) (holding that "[w]hen the words chosen by the legislature are unclear because they are susceptible to multiple reasonable, alternative interpretations, the statute is ambiguous").

Additionally, although the parties have not raised this issue, it is arguable that Defendants' construction makes the word "simultaneously" surplusage. *Cath. Health Initiatives Colorado v. City of Pueblo, Dep't of Fin.*, 207 P.3d 812, 821 (Colo. 2009), *as modified on denial of reh'g* (June 1, 2009) (explaining that when construing a statute, a court analyzes it as a whole, "ascribing to each word and phrase its familiar and generally accepted meaning," and assume that the drafters intended that "meaning should be given to each word") (citation omitted). The heart of this argument is that there is no situation in which enterprises that are created "within the five preceding years" does not also include those that are created "simultaneously." This would render "simultaneously" superfluous. However, the Court is not persuaded by the reliance on this contextual canon of construction, because "preceding" means "existing, coming, or occurring immediately before in time or place." *Preceding*, Merriam-Webster.com, Merriam-Webster, https://www.merriam-webster.com/dictionary/preceding (last visited Apr. 22, 2024).

"Simultaneously" has the common meaning of "in a simultaneous manner : at the same time : concurrently." *Simultaneously, Webster's Third New International Dictionary* (2002). Two or more enterprises created simultaneously, like those in S.B. 21-260, cannot exist or occur before

or after each other in time. As a result, they are necessarily outside the parameters of the phrase "withing the five preceding years." The Court, therefore, concludes that Defendants' interpretation does not result in surplusage. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (finding that "the canon against surplusage merely favors that interpretation which avoids surplusage").

As the pain language of Section 108 is susceptible to different interpretations, the Court finds that it may turn to extrinsic evidence to determine the electorate's intent. *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996); *see Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004) ("Courts may determine [drafter intent] 'by considering other relevant materials such as the ballot title and submission clause and the biennial "Bluebook," which is the analysis of ballot proposals prepared by the legislature.'") (quoting *In re Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999)); *see also Mesa Cnty. v. State*, 203 P.3d 519, 533-34 (Colo. 2009) (the intent of the drafters is irrelevant when not expressed within the language of a ballot initiative).

The Court considers the language of the 2020 Ballot Information Booklet, which the parties have discussed in their briefing. *See 2020 State Ballot Information Booklet*, LEGIS. COUNCIL OF THE COLO. GEN. ASSEM. 50 (Sept. 11, 2020), https://leg.colorado.gov/sites/default/files/blue_book_english_for_web_2020_1.pdf. ("Blue Book"). The Blue Book provided information on what would happen should Proposition 117 pass, stating: "[f]or multiple enterprises created to serve primarily the same purpose, including those created during the past five years, revenue is added together to determine whether voter approval is required." *Id*. at 50.

Defendants argue that Blue Book's use of the term "multiple enterprises" paraphrases the word "simultaneously" in Section 108. Mot. at 13; Reply at 7. As Defendants explain, "multiple enterprises created" must refer to enterprises that are created "simultaneously," because there is

no other language in Section 108(2) that it could relate to. *Id*. Plaintiffs argue that this position lacks "factual support." Resp. at 11. However, the interpretation of a statute or ballot measure is not a factual issue. *Tabor Found. v. Colorado Bridge Enter.*, 353 P.3d 896, 900 (Colo. App. 2014) (explaining that a trial court's decisions concerning the interplay of TABOR and related statutes are legal conclusions that are reviewed de novo on appeal).

Plaintiffs' response also discusses both the Blue Book and Field's deposition testimony. Resp. at 10-11; Defs.' Ex. B. Plaintiffs argue that the Blue Book's explanation supports their interpretation that "by leaving out "simultaneously" the Blue Book assumed, as did Michael Fields, that multiple enterprises created simultaneously would serve primarily the same purpose or violate single-subject." *Id*. at 11-12. Plaintiffs' argument requires the court to infer from the absence of the word "simultaneously," that the electorate intended that enterprises would need to serve primarily the same purpose or violate the single subject requirement. The Court is not persuaded and will rely on the plain meaning of the words contained in the Blue Book. Moreover, the Court is also mindful that as a proponent of Section 108, Field's testimony is of limited value when deciphering the intent of a voter-approved initiative. *Mesa Cnty.*, 203 P.3d at 533-34.

In this situation it is the Blue Book that "provides important insight into the electorate's understanding" and "shows the public's intentions in adopting" ballot initiatives. *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003). A plain reading of the 2020 Blue Book's language lends support to Defendants' position that the clause "multiple enterprises" includes enterprises that are created "simultaneously." The word "multiple" is primarily defined as "consisting of, including, or involving more than one." *Multiple*, *Webster's Third New International Dictionary* (2002). "Simultaneously" has the common meaning of "in a simultaneous manner : at the same time : concurrently." *Simultaneously, Webster's Third New International Dictionary* (2002).

Although "simultaneously" has a temporal element, it has overlap with "multiple" because for a thing to exist or occur at the same time as another, there necessarily must be more than one. Further, the clause "including those created during the past five years" is a subset of "multiple enterprises created to serve primarily the same purpose." By structuring its explanation this way, the Blue Book indicates that "serving primarily the same purpose" applies to "multiple enterprises" and "those created during the past five years." Plaintiffs' assertion that a court need not consider whether enterprises that are created simultaneously serve primarily the same purpose is not supported by the Blue Book's language. As Defendants explain, to read the Blue Book in any other way would result in the omission of the term "simultaneously" entirely from its description of the statute. Thus, the Court finds, as a matter of law, that revenues must only be aggregated under Section 108(2) for those enterprises "serving primarily the same purposes."

Here, the plain language of S.B. 21-260 demonstrates that the five enterprises at issue have differing purposes. For example, the primary purpose of the clean transit enterprise is to "reduce and mitigate the adverse environmental and health impacts of air pollution and greenhouse gas emissions produced by motor vehicles used to make retail deliveries." S.B. 21-260, at § 52. In contrast, the community access enterprise is charged with "reducing and mitigating the adverse environmental and health impact of air pollution" by "support[ing] the adoption of electric motor vehicles and electric alternatives to motor vehicles at the community level." *Id.*, at § 1. The clean fleet enterprise's purpose is to mitigate the adverse effects of pollution caused by "fleet motor vehicles being used to provide transportation network company rides," while the nonattainment area air pollution enterprise's focus is on mitigating the impacts of air pollution in "nonattainment areas that result from rapid and continuing growth in retail deliveries." *Id.* Lastly, the bridge and tunnel enterprise is charged with "providing bridges and repairing, maintaining, and operating

tunnels in a manner that incorporate incorporates the benefits of advanced engineering design, experience, and safety." *Id*., at § 48.

Because these five enterprises serve different primary purposes, the Court finds that the enterprise fees authorized by S.B. 21-260 do not need to be aggregated under Section 108.

B. S.B. 21-260's creation of multiple enterprises does not violate the Single Subject Requirement of the Colorado Constitution

Plaintiffs argue in the alternative that S.B. 21-260 includes five enterprises that are not dependent upon or connected with each other and, therefore, the bill violates the Colorado Constitution's single subject rule. Compl. at 11.

Article V, section 21 of the Colorado Constitution states, in pertinent part, "[n]o bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." With regard to bill titles, the supreme court has previously found that "[t]he general assembly may, within reason, make the title of a bill as comprehensive as it chooses, and thus cover legislation, relating to many minor but associated matters. *In re Breene*, 24 P. 3, 4 (1890) (offering as an example, "[a]n act in relation to municipal corporations' may provide for the erganization [sic], government, powers, duties, offices, and revenues of such corporations, as well as for all other matters pertaining thereto"). S.B. 21-260's complete title reads:

> Concerning The Sustainability Of The Transportation System In Colorado And, In Connection Therewith, Creating New Sources Of Dedicated Funding And New State Enterprises To Preserve, Improve, And Expand Existing Transportation Infrastructure, Develop The Modernized Infrastructure Needed To Support The Widespread Adoption Of Electric Motor Vehicles, And Mitigate Environmental And Health Impacts Of Transportation System Use; Expanding Authority For Regional Transportation Improvements; And Making An Appropriation.

Defendants allege that S.B. 21-260's multiple enterprises serve distinct, but interrelated purposes. Mot. at 16. They argue that the single subject of S.B. 21-260 is "the sustainability of

the transportation system in Colorado." S.B. 21-260, § 1. Defendants assert that the General Assembly crafted S.B. 21-260 by dividing its provisions into three main categories, each of which supports the subject in various ways. Mot. at 15. The first set of provisions reduce or mitigate the harms created by the transportation system and includes the creation of four new enterprises. *See, e.g.,* S.B. 21-260, § 1. The second set of provisions set up new funding mechanisms to support those enterprises and to amend the excess state revenues limit. *See, e.g., id.*, at §§ 8 (amending the excess state revenues cap and including an increase of $224,957,602 for the 2020-21 fiscal year); 35 (establishing various road usage fees); 48 (creating the "bridge and tunnel impact fee, and a bridge and tunnel retail delivery fee"). The third group of provisions relate to building and repairing infrastructure needed to support the transportation system. *See, e.g., id.*, at § 30 (implementing a motor vehicle study with the goal of "identifying any modifications or additions that the existing state transportation infrastructure may need to enable the use of autonomous motor vehicles").

Plaintiffs argue that Defendants fail to cite any evidence or law to support their interpretation that the enterprises serve separate purposes within a comprehensive regulatory scheme. Resp. at 12. However, Defendants rely on the text of S.B. 21-260 itself, which demonstrates that the various enterprises have "distinctive competencies and are each charged with implementing different components" of its "comprehensive regulatory scheme." S.B. 21-260, § 1(2)(a) & (d); Mot. at 17.

As the challenging party, Plaintiffs offer no authority limiting the power of the General Assembly to create separate enterprises, even if the various programs have some differences. This act of the legislature carries a heavy presumption of constitutionality, and the Court finds that Plaintiffs have failed to prove beyond a reasonable doubt that the presumption should not apply.

Barber v. Ritter, 196 P.3d 238, 247 (Colo. 2008); *see also* 1A Sutherland Statutory Construction § 17:2 (7th ed. Nov. 2023) (explaining that "[w]here there is any reasonable basis for grouping various matter of the same nature together in one act, and the public cannot be deceived reasonably, the act does not violate the single subject requirement").

Based on the foregoing, the Court finds as a matter of law that S.B. 21-260's creation of multiple enterprises does not violate the constitutional single subject rule.

C. S.B. 21-260 did not repeal by implication any conflicting portions of Section 108[4]

Defendants argue that even if S.B. 21-260 violates Section 108, "the legislature has unfettered authority to pass any statute, subject only to constitutional limitations," and, as such, the passage of the bill repealed any confliction portions of Section 108 by implication. Mot. at 19-21.

The Court begins this analysis by first interpreting the text of S.B. 21-260 to determine and give effect to the intent of the legislature. *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010). When interpreting statutes, courts look to the language employed and, if unambiguous, apply the statute as written, unless doing so would lead to an absurd result. *MDC Holdings*, 223 P.3d at 717. Even in the face of statutory silence, questions of interpretation are governed by legislative intent. *Williams v. White Mountain Constr. Co.*, 749 P.2d 423, 428 (Colo. 1988). The Court also presumes that the General Assembly was generally aware of Section 108's requirements when it passed S.B. 21-260. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004) (explaining that courts may also presume the legislature is aware of its own

[4] Both parties raised the issue of the validity of General Assembly's statements in S.B. 21-260 that the newly created enterprise did not violate Section 108. Mot. at 21; Resp. at 15. The Court agrees with Plaintiffs that these statements are not binding on the Court's conclusions but finds that they are persuasive as to the legislature's intent regarding Section 108's mandates.

enactments and existing case law precedent); *see State ex rel. Weiser v. City of Aurora*, 535 P.3d 988, 993 (Colo. App. 2023). As Plaintiffs point out, and as demonstrated below, Section 108 was cross referenced in the bill's initial legislative declaration. S.B. 21-260, § 1.

A legislative declaration is an "explicit or formal statement or announcement about the legislation" that "indicates the problem the General Assembly is trying to address." Colo. Office of Legis. Legal Servs., *Colorado Legislative Drafting Manual 2–40* (Feb. 2014). While some legislative declarations are codified, the supreme court nevertheless treats those that are not as equal in authority. *See Stamp v. Vail Corp.*, 172 P.3d 437, 443 n. 7 (Colo. 2007) (stating "the [2004 Colorado Legislative Drafting] manual is silent as to when a legislative declaration ought to be codified"). Here, the General Assembly declared:

> Because the community access enterprise, the clean fleet enterprise, the nonattainment area air pollution mitigation enterprise, and the clean transit enterprise each serve primarily their own purpose and each enterprise **is projected to receive revenue from fees and surcharges of less than one hundred million dollars in its first five fiscal years,** including the fiscal year in which its board first meets, **section 24-77-108, C.R.S., does not require any of the enterprises to be approved at a statewide general election**; and . . .

S.B. 21-260, § (2)(f) (emphasis added).

S.B. 21-260's text offers valuable insight into the General Assembly's intent when it drafted the statute. Here, the language demonstrates that the authors of S.B. 21-260 were aware of Section 108's mandates on enterprise revenues because it explicitly states that the four new enterprises' revenues would "serve primarily their own purpose" and that each is projected to receive less than $100 million from fees during the first five years. The General Assembly could have omitted this statement entirely from the bill, but it chose to include it instead. Furthermore, the General Assembly concluded that Section 108's voter-approval mandate did not apply to any of the enterprises listed.

Defendants assert in the alternative, that even if S.B. 21-260 does not comply with Section 108, the court should not invalidate the statute because it would treat Section 108 as if it were a constitutional amendment or as a statute not subject to implied repeal. Mot. at 20-21. Defendants cite *People v. Y.D.M.*, 593 P.2d 1356, 1359 (Colo. 1979), for the proposition that the General Assembly is vested with the authority to adopt general laws, subject only to state and federal constitutional limitations. Mot. at 19. Plaintiffs agree with the basic premise, but counter that the legislature may only overturn prior existing laws by repealing or suspending them. Resp. at 13-14.

There is no clear indication in this statute or record that the General Assembly intended to repeal Section 108, either expressly or by implication. *See People v. Dist. Ct*., 585 P.2d 913, 915 (Colo. 1978) (holding that where two statutes attempt to regulate the same conduct, the more specific statute preempts, but only to the extent that there is a manifest inconsistency between the two statutes, because statutory repeals by implication are disfavored). To the contrary, as stated above, the evidence strongly suggests that the General Assembly crafted S.B. 21-260 so that it conforms with Section 108's mandates regarding enterprise revenues. Indeed, the fiscal note to S.B. 21-260, explains that "[s]hould fee revenue to any new enterprise approach $100 million, it is assumed that the enterprise board will set fees so as not to exceed this amount." Legislative Council Staff, *Final Fiscal Note*, Sept. 9, 2021, at 6, 2021a_sb260_f1.pdf (colorado.gov). This evidence leaves little doubt that the General Assembly was aware of Section 108's mandates when it crafted S.B. 21-260, and that it drafted the statute to comply with those mandates. Thus, implied repeal would be inappropriate as S.B. 21-260 and Section 108 are not inconsistent.

The Court finds as a matter of law that S.B. 21-260 did not repeal, either expressly or impliedly, Section 108. Thus, Defendants are entitled to summary judgment on Plaintiffs' first claim for relief.

II. Second Claim for Relief

In their second claim for relief, Plaintiffs argue that the creation of the enterprises amounts to the "qualification" of an enterprise within the meaning of TABOR, requiring a downward adjustment of the excess state revenues cap, and corresponding refunds. TABOR limits the amount of money that the state government can collect and spend in a fiscal year. Under Colorado Constitution article 20, Section 20(7)(d), "[q]ualification or disqualification as an enterprise shall change district bases and future year limits." Plaintiffs argue that "[t]he qualification of any enterprise requires the General Assembly to adjust the TABOR limit/Referendum C revenues cap downward by an amount equal to the aggregate off the expected first-year revenue of the enterprise." Compl. at 11. Thus, they assert that S.B. 21-260 violated TABOR because it made no such downward adjustment.

Defendants argue that summary judgment must be granted as to this claim because "TABOR requires an adjustment to the excess state revenues cap only for existing State enterprises that are transferred to an enterprise; no adjustment is required for the creation of a new enterprise or the expansion of an existing enterprise." Mot. at 24. Alternatively, Defendants argue that the first-year revenue actually collected by each enterprise was zero and, therefore, Plaintiffs' argument is a nullity because there would be no downward adjustment even if Plaintiffs were correct. Plaintiffs respond that if an enterprise has no first-year revenue, then it was not put into use until a later date and the enterprise should be considered "qualified" at whatever point in time it is "put into use" and begins to receive revenues. Resp. at 18.

TABOR limits the amount of money that the state government can collect and spend in a fiscal year. Colo. Const. art. X, § 20(7). The maximum amount that the state can retain in revenue is the previous year's spending adjusted by inflation and the percentage change in population

growth. Colo. Const. art. X, § 20(7)(a). This is referred to as the limitation on fiscal year spending. C.R.S. § 24-77-103 (2023). In 2005, voters passed Referendum C, which created a five-year timeout during which the state was authorized to keep or spend all the revenue it collected. C.R.S. § 24-77-103.6. The year with the highest amount of revenue during this time period established the excess state revenues cap. *Id.* This new cap is also adjusted by inflation and population growth, but is calculated from the previous year's cap, not the previous year's spending. *Id.* Both the limitation on state fiscal year spending and the excess state revenues cap are adjusted by debt service changes, and by the qualification or disqualification of enterprises. *Id.*; Colo. Const. art. X, § 20(7)(d).

Plaintiffs assert that S.B. 21-260 triggered a one-time adjustment of the excess state revenues cap, because the creation of new enterprises under S.B. 21-260 resulted in "qualification" within the meaning of TABOR. Compl. at 11. Because no downward adjustment was made, S.B. 21-260 violated TABOR and the constitution. *Id.* Acknowledging that the term "qualification" is not defined by TABOR, Plaintiffs claim that it should be interpreted broadly to include newly created enterprises. *Id.* Defendants disagree and argue that TABOR requires an adjustment to the excess state revenues cap only for existing revenues that are transferred to an enterprise. Mot. at 27. They claim that no adjustment is required for the creation or expansion of an existing enterprise. *Id.*

As previously stated, a statute challenged on constitutional grounds enjoys a heavy presumption of constitutionality which "can be overcome only if it shown that the enactment is unconstitutional beyond a reasonable doubt." *Barber*, 196 P.3d at 247. As the court in *Barber* noted, TABOR's internal rule of construction that courts are to favor a construction that would "reasonably restrain most the growth of government," COLO. CONST. art X, § 20(1), "applies

only where the text of [TABOR] supports multiple interpretations equally." *Id.*, 196 P.3d at 247-148 (citing *Havens v. Bd. of Cnty. Comm'rs*, 924 P.2d 517, 521 (Colo. 1996)).

Courts have not yet interpreted the phrase "qualification or disqualification of enterprises," and it is not one that has a constitutional definition. As such, the Court is unaware of any standards to determine if a governmental action amounts to a "qualification" or "disqualification" of an enterprise. The few cases that mention qualification or disqualification relate to whether an entity "qualifies" because it meets the TABOR requirements to be an enterprise. *E.g. Bd. of Cty. Comm'rs v. Fixed Base Operators, Inc.*, 939 P.2d 464, 468 (Colo. App. 1997) (rejecting a plaintiff's argument that a corporation was "disqualified" as an "enterprise" because its annual government revenues did not exceed 10%); *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 869 (Colo. 1995) (holding that a public highway authority was not an enterprise under TABOR because it could impose taxes with no direct relation to the services it provided).

However, the record demonstrates that one of the most common scenarios in which an enterprise may meet the TABOR requirements for "qualification" or "disqualification" occurs with higher education institutions. Kahn Decl., ¶ ¶ 21-23. For example, in the 2004-05 fiscal year, the University of Colorado received less than 10% of its revenue from state funding, and thus met the requirements to be an enterprise. *Id*. at 26; Ex. C, *State of Colorado Schedule of Computations Required Under Article X, Section 20* (June 30, 2006). At that point it was "qualified" as an enterprise, and the limitation on state fiscal year spending for 2005-06 was adjusted by $349,941,004. *Id*. (stating that by 2006, "all state institutions of Higher Education became fully qualified TABOR enterprises with the exception of the Auraria Higher Education Center and the University of Colorado, the latter of which became a fully qualified enterprise in Fiscal Year 2004-

05"). Based on the record before the Court, the excess state revenues cap has historically been adjusted only when a pre-existing entity has become "qualified" or "disqualified" as an enterprise.

As Defendants point out, S.B. 21-260's text indicates that it does not transfer existing revenue streams into any of the enterprises that would trigger "disqualification." Mot. at 27. Rather the bill creates four new enterprises, and it expands an existing one. *See* S.B. 21-260, §§ 1; 48. These enterprises also all receive new revenue streams. *See, e.g.*, C.R.S. § 24-38.5-303(7) (the community access retail fee); § 43-4-805(5)(g.7) (the bridge and tunnel retail delivery fee); § 43-1-1308(8) (air pollution mitigation retail delivery fee); § 43-4-1203(7) (the clean transit retail delivery fee).

Plaintiffs argue that there is precedent for adjusting the spending cap downward for newly created enterprises. Resp. at 17. They assert that that occurred in 2017 when the General Assembly created the Healthcare Affordability and Sustainability Enterprise. *Id.*; *see also* S.B. 17-267, § 17. TABOR did not mandate such an action. Rather, as Defendants correctly note, the General Assembly voluntarily chose to reduce the excess state revenues cap for the 2017 fiscal year. As the legislature indicated then:

> Notwithstanding section (3)(c)(I) of this section, because the repeal of the hospital provider fee program… will allow the state to spend more general fund money for general governmental purposes that it would otherwise be able to spend below the excess state revenues cap, … it is *appropriate* to restrain the growth of government by lowering the base amount used to calculate the excess state revenues cap for the 2017-18 state fiscal year by two hundred million dollars.

S.B. 17-267, § 17 (emphasis added); *see also* C.R.S. § 25.5-4-402.4(3)(c)(II).

There is no language in the General Assembly's declaration to suggest that the 2017 reduction was mandatory under TABOR. *See generally id*. A partial adjustment of the state revenues cap was deemed "appropriate" by the General Assembly as a policy matter "to restrain

the growth of government." *Id*. As the supreme court has previously held, courts "must give significant deference to the legislature's fiscal and policy judgments," even with respect to constitutional questions. *Lobato v. Colorado*, 218 P.3d 358, 374-375 (Colo. 2009) ("The trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of "thorough and uniform" system of education," pursuant to Colorado Constitution article 9, Section 2).

Plaintiffs also claim that because the word "qualification" is ambiguous, the "door is open to interpretive aids." Resp. at 17. They argue that not all available evidence is fully in the record, which would make summary judgment inappropriate. *Id*. Defendants assert that Plaintiffs have failed to show a disputed material fact exists because the Kahn Declaration's statements on the qualification and disqualification of enterprises are undisputed and, therefore, control against the allegations in the Complaint. Reply at 12. The Court agrees and finds that Plaintiffs have not pointed to any evidence that contradicts or undermines the Kahn Declaration. *Victorio Realty, v. Ironwood IX*, 713 P.2d 424, 425 (Colo. App. 1985) ("Once the moving party makes a convincing showing that genuine issues are lacking, the opposing party must adduce facts, through affidavit or otherwise, demonstrating that a real controversy exists."). Considering the high presumption of constitutionality, and the evidence before the Court, the Court finds that Plaintiffs have not demonstrated that a downward adjustment of the excess state revenues cap is required for the creation of new enterprises as a "qualification" under TABOR. *See Barber*, 196 P.3d at 248 (a court must be careful to "reasonably interpret [TABOR] and maintain the government's ability to function efficiently"); *City of Aspen*, 418 P.3d at 512.

In the alternative, Defendants argue that under S.B. 21-260, the first-year revenue from each enterprise is zero and, therefore, Plaintiffs' argument is a nullity because there would be no

downward adjustment even if Plaintiffs were correct. Mot. at 25 (citing as an example section 40-10.1-118 of the Colorado Revised Statutes, which authorizes transportation network ride fees with an effective date of "on or after July 1, 2022"). Plaintiffs assert that if an enterprise has no first-year revenue, then it was not put into use until a later date and the enterprise should be considered "qualified" at whatever point in time it is "put in use" and begins to receive revenues. Resp. at 18. However, Plaintiffs cite no evidence or statute to support their argument. *Id*. The Court finds that Plaintiffs have not sustained their burden of proof on this issue.

Plaintiffs have not demonstrated beyond a reasonable doubt that S.B. 21-260's enterprises were "qualified" or "disqualified" within the meaning of TABOR. Colo. Const. art. X, § 20(7)(d). As a result, the court finds that Plaintiffs have not met their burden to show that S.B. 21-260 triggered a downward adjustment of the excess state revenues cap. Therefore, the Court finds that no disputed material fact exists, and concludes that summary judgment in favor of Defendants is appropriate as to this claim.

III. Third Claim for Relief

In their third claim for relief, Plaintiffs argue that (1) S.B. 21-260 increased the excess state revenues cap by $224,957,602; (2) that this provision "is a separate subject" from the rest of the bill; and (3) that including it violates the Colorado Constitution. Compl. at 11-12. Plaintiffs allege that the increase to the excess state revenues cap is not related to the bill's stated purpose regarding the sustainability of the transportation system, and that it "relates to the budgeting of the State as a whole." Resp. at 19. Defendants argue that summary judgment is appropriate as to this claim, because S.B. 21-260 did not increase the excess state revenues cap, but rather that provision in the bill was simply a "return to the [previous] voter-approved excess state revenues cap." They also argue that this return "is an implementation provision that is directly connected to the [S.B. 21-

260]'s single subject because it is necessary for some of the fees imposed by the bill to be used to create a sustainable transportation system." Mot. at 29.

In 2017 the General Assembly Bill voluntarily lowered the state's revenues cap by $200 million. *See* C.R.S. § 24-77-103.6(6)(b)(I)(C). However, S.B. 21-260 included a provision which seemingly undoes that prior action:

> For the 2020--21 fiscal year, an amount that is equal to the excess state revenues cap for the 2019--20 fiscal year calculated pursuant to subsection (6)(b)(I)(E) of this section, adjusted for inflation, the percentage change in state population, the qualification or disqualification of enterprises, and debt service changes, **plus two hundred twenty-four million nine hundred fifty-seven thousand six hundred two dollars**; and

C.R.S. § 24-77-103.6(6)(b)(I)(F) (emphasis added).

As previously detailed, the "single subject" provision of the Colorado Constitution, states that "[n]o bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." Colo. Const. art. V, § 21. The supreme court has held that, "[t]he purposes of section 21 are: (1) to notify the public and legislators of pending bills so that all may participate in the legislative process; (2) to guarantee that each legislative proposal passes on its own merit; and (3) to enable the governor to consider each piece of legislation separately in determining whether to exercise veto power." *Parrish v. Lamm*, 758 P.2d 1356, 1362 (Colo. 1988) (citing *In re House Bill No. 1353*, 738 P.2d 371, 372 (Colo. 1987)). As the supreme court explained in *Parrish*, "[s]o long as the matters encompassed in the bill are necessarily or properly connected to each other rather than disconnected or incongruous, the single subject requirement of section 21 is not violated." *Parrish*, 758 P.2d at 1362 (citing *In re House Bill No. 1353*, 738 P.2d at 374). The title of S.B. 21-260, provides in relevant part:

> Concerning The Sustainability Of The Transportation System In Colorado And, In Connection Therewith, Creating New Sources Of Dedicated Funding And New

State Enterprises To Preserve, Improve, And Expand Existing Transportation Infrastructure...

Plaintiffs argue that because S.B. 21-260 increased the excess state excess revenues cap by $224,957,602, that this provision "is a separate subject" from the rest of the bill and is unconstitutional. Resp. at 12. Defendants disagree and assert that the bill's funding provisions noted above are directly related to the bill's "central focus." Mot. at 29. Specifically, Defendants argue that S.B. 21-260's change to the excess state revenues cap is an implementation provision that is directly connected to the bill's subject of creating a sustainable transportation system. *Id.* "Implementation details that are 'directly tied' to the initiative's "central focus" do not constitute a separate object." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000) (explaining that the proper focus is not the intent of the drafters nor to construe the legal effect of a proposal as if it were law, but to determine "whether or not the implementation provisions tend to "effect or to carry out" the "one general object or purpose of the [measure]"") (quoting *Matter of Title, Ballot Title, Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rts. in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995), *as modified on denial of reh'g* (July 31, 1995))).

S.B. 21-260's title spells out in no uncertain terms that one of its goals is to "create new sources of dedicated funding" in connection with sustaining Colorado's transportation system. In addition to the new or expanded fees associated with the five enterprises, S.B. 21-260 also provides for other fees that factor into the excess state revenues cap. *Compare* S.B. 21-260, at § 35 (providing for enterprise fees), *with id.*, at § 26 (increased registration fees for electric vehicles), *and id.*, at § 35 (indexing per gallon fuel charges to reflect inflation), *and id.*, at § 35 (indexing per gallon "special fuel" charges to reflect inflation). Because these fees are subject to the excess state

revenues cap, any revenues above that cap could either be refunded to taxpayers or subject to a vote on alternative uses under TABOR. Mot. at 29-30. Therefore, Defendants argue that the increase to the excess revenues cap is directly tied to S.B. 21-260's goal of sustaining the state's transportation system, which requires financial support. *Id.*

Plaintiffs disagree and allege that S.B. 21-260's increase to the excess state revenues cap relates to the "budgeting of the State as a whole" and not just the sustainability of the transportation system. Resp. at 19. However, Plaintiffs have not demonstrated how S.B. 21-260's provision is incongruous with the stated purpose of the bill. Under the *Parrish* standard, Plaintiffs must demonstrate beyond a reasonable doubt that the change to the excess revenues cap is not connected with any of the other provisions in S.B. 21-260. As Defendants point out, S.B. 21-260's "central focus" of sustaining the transportation system cannot be achieved without a reliable funding source, and increasing the excess state revenues cap is directly related to that goal. Mot. at 29-30.

The Court concludes as a matter of law that S.B. 21-260 meets the Colorado Constitution's single subject requirements and, therefore, finds that Plaintiffs have not met their burden to show beyond a reasonable doubt that a genuine dispute of fact exists. Thus, the Court finds that summary judgment in warranted in favor of Defendants on Plaintiffs' Third Claim for Relief.

IV. Fourth Claim for Relief

In their fourth claim for relief, Plaintiffs argue that S.B. 21-260's increase to the excess state revenues cap for the 2020-21 fiscal year referenced in claim three was "effected without voter approval" and, therefore, violated TABOR and Referendum C. Defendants argue that summary judgment should be granted as to this claim because, as noted above, there was no increase to the state revenues cap for the 2020-2021 fiscal year. They argue that, for Fiscal Year 2018, the legislature made "a $200 million downward adjustment to State spending," and that this was not a

change to the excess state revenues cap but merely "a voluntary agreement . . . to temporarily abide by [this] lower spending limit." Mot. at 28. Therefore, the $224,957,602 spending increase provided for in S.B. 21-260 was not an increase to the state revenues cap, it was merely a provision returning spending to the pre-existing voter-approved cap limit, which never decreased.

Plaintiffs assert that S.B. 21-260 violates both TABOR and Section 108 because it increases the excess state revenues by $224,957,602 without prior voter approval, which affects refunds made pursuant to the state constitution. *See* Colo. Const. art. X, § 20; Compl. at 12; Resp. at 18. Defendants counter that S.B. 21-260 returned the state's spending authority to a previously authorized amount, negating the requirement for additional voter input. Mot. at 13. As previously discussed, trial courts "must give significant deference to legislature's fiscal and policy judgments," even with respect to constitutional questions. *Lobato v. Colorado,* 218 P.3d 358, 374-375 (Colo. 2009). Because Plaintiffs present a statutory and constitutional challenge to S.B 21-260, the court is cognizant that the statutes are entitled to a "heavy presumption of constitutionality" which can be overcome "only if it is shown that the enactment is unconstitutional beyond a reasonable doubt." *Barber v. Ritter,* 196 P.3d 238, 247 (Colo. 2008).

In 2005, Colorado voters adopted a referred measure, known as Referendum C, which provided a five-year "timeout" from the application of the spending limits under TABOR. C.R.S. § 24-77-103.6(1)(a). Pursuant to Referendum C, a new "excess state revenues cap" was established as the new limit on state revenues and the trigger for refunds under TABOR. This new cap was to be based upon the highest total annual revenues the state collected between 2005 and 2010. C.R.S. § 24-77-103.6(1)(b) and 103.6(6)(b)(I)(B). The statue provides in part that:

> Notwithstanding any provision of law to the contrary, for each fiscal year commencing on or after July 1, 2010, the state shall be authorized to retain and

> spend all state revenues that are in excess of the limitation on state fiscal year spending, **but less than the excess state revenues cap for the given fiscal year**.

C.R.S. § 24-77-103.6(1)(b) (emphasis added).

As Plaintiffs point out, the state excess revenues cap changes from year-to-year based on factors such as "percentage change in population," and "qualification or disqualification of enterprises." C.R.S. § 24-77-103.6. Future calculations of the state excess revenues cap are also seemingly dependent on the prior year's figure, which is reflected in the statutory text. *See id*. For example, for the 2018-19 fiscal year the cap is factored using "the amount of the excess state revenues cap for the 2017--18 fiscal year calculated pursuant to subsection (6)(b)(I)(C) of this section…." *Id*. However, the statute refers only to the 2005 Referendum C election as constituting "a voter-approved revenue change to allow the retention and expenditure of state revenues in excess of the limitation on state fiscal year spending." C.R.S. § 24-77-103.6(4). The plain language of the statute does not resolve the issue of whether the General Assembly may increase the amount of the excess state revenues cap without subsequent voter authorization.

No court has ruled on the precise issue presented here, but both parties' arguments cite the Colorado Supreme Court's decision in *Mesa Cnty. Bd. of Cnty. Comm'rs*, 203 P.3d 519 (Colo. 2009). At issue in *Mesa County* was whether the General Assembly's 2007 amendments to the School Finance Act violated TABOR. *Id.* at 523. Those amendments exempted local school districts from TABOR's property tax revenue limit if they had previously passed broadly worded waiver elections. *Id.* at 526. The plaintiffs in *Mesa County* argued that TABOR's property tax limit could not be waived without additional voter approval. *Id*. The supreme court held that a second election was not required, reasoning that once a revenue limit was waived by voters, the General Assembly could later direct "the use of additional funds that a district received as a result of the

wavier election." *Id*. at 530. "Such legislation is not a policy change, but an implementation of the waiver election." *Id*.

Plaintiffs allege that the facts in *Mesa County* are distinct from those at hand, because the court "was dealing with "broadly worded ballot" issues that waived TABOR's revenue limits in their entirety." Resp. at 18. As such, that system allowed lawmakers to "create a cap and then raise, lower, or eliminate it at will." *Id*. Plaintiffs argue that the excess state revenues cap is different because it is subject to a voter-approved formula that resets each year, and is based on the prior year's cap. *Id*. Because the General Assembly amended the excess revenues cap voluntarily downward by two hundred million dollars for the 2017-18 fiscal year, that set the state on a new fiscal path for subsequent years by decreasing how much revenue the state could retain.

Defendants, on the other hand, assert that "[S.B. 21-260] reverts to precisely the same formula approved by voters in Referendum C." Reply at 14. In other words, "because voters have already approved the excess state revenues cap, [S.B. 21-260's] adjustments were within the legislature's authority, and they did not violate TABOR." Mot. at 28. Defendants argue that *Mesa County's* reasoning is applicable because S.B. 21-260 reverts the excess state revenues cap to the same, narrow, formula as approved by voters in 2005. Reply at 14.

The Court finds that *Mesa County*'s analysis is limited because the supreme court relied heavily on the TABOR provision that "[v]oter-approved revenue changes do not require a tax rate change." Colo. Const. art. X, § 20(7)(d). The supreme court interpreted that phrase to mean that if a district's voters authorized a valid revenue limit waiver, "it need not also conduct a tax rate change election." *Mesa Cnty.*, 203 P.3d at 530. The supreme court in *Mesa County* did not opine on whether additional voter-authorization is required to increase the excess state revenues cap in situations where the General Assembly voluntarily amends the cap downward. Additionally,

Referendum C was referred to the voters, and the statutory changes were fully implemented by the General Assembly the very same year. *See* H.B. 05-1194, § 1; *see also* C.R.S. § 24-77-103.6. That differs from *Mesa County* where the General Assembly waited several years before attempting to carry out the intent of the districts' voters. *Mesa Cnty*., 203 P.3d at 524-25.

Because statutory language and case law do not resolve this issue, the court turns to the extrinsic evidence in the record. First, the Schedule of Computations Under Article X, Section 20 from 2006 provides some overview of Referendum C. Ex. C, at 21. However, the document's usefulness is limited as it only recites a basic summary of Referendum C. *See id*. Similarly, the Statements made by Michael Fields mention Referendum C, but only briefly. Ex. B, at 36 ("Referendum C was passed in 2005, which lifted the TABOR cap and allowed it to be spent on different transportation and education – transportation, education and health care, I believe.")

The Kahn Declaration provides the most relevant information on S.B. 21-260's adjustment to the excess state revenues cap. Kahn Decl., ¶ ¶ 28-29. The Kahn Declaration indicates that "the downward fiscal adjustment of $200 million of the [excess state revenues cap] in SB 17-267, for Fiscal Year 2017, was not a permanent adjustment of the [excess state revenues cap], nor could it be." *Id*., ¶ 29. The Kahn Declaration goes on to state that "[t]he [excess state revenues cap] is voter-approved" and that "SB260 returned the cap to the voter-approved limit." *Id*. These statements support Defendants' argument that the General Assembly's $200 million reduction was a temporary measure, and that it retained the authorization of the electorate to return to the prior approved excess revenues cap formulation. Mot. at 28-29. Because Plaintiffs have not presented any extrinsic evidence to support their position, the court concludes that the record substantiates Defendants' claims. *Jones v. Barnhart*, 349 F.3d 1260, 1265-66 (10th Cir. 2003) (holding that on

summary judgment, a court's "role is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate factfinder, to sustain [a] claim").

Based on the foregoing, the Court finds that Plaintiffs have failed to sustain their burden of demonstrating beyond a reasonable doubt the unconstitutionality of S.B. 21-260's adjustment of the excess state revenues cap by increasing it $224,957,602. As such, the Court finds that summary judgment is warranted in favor of Defendants.

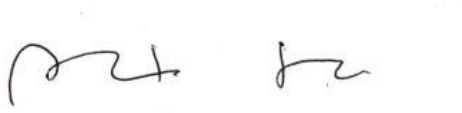
CONCLUSION

Accordingly, for the foregoing reasons and authorities, Defendants' motion for summary judgment is GRANTED. The Court HEREBY ENTERS SUMMARY JUDGMENT in favor of Defendants and against Plaintiffs on all of Plaintiffs' claims. The trial scheduled to begin on May 6, 2024 is VACATED.

IT IS SO ORDERED.

DATED: April 29, 2024

BY THE COURT:



ANDREW J. LUXEN
District Court Judge