COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 28, 2016 8:45 AM FILING ID: 33D359816CD12 CASE NUMBER: 2016SC112
Certiorari to the Court of Appeals, 2014CA1816 District Court, City and County of Denver, 2013CV34544 **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 Mrs. of the Colorado Department of Health Care Policy and Financing; and LARRY WOLK, in his official capacity as Executive Mrs. of the Colorado Department of Public Health & Environment.	
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PETITIONER'S OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

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

1. The brief complies with the applicable word limits set forth in C.A.R. 28.

   It contains 7,919 words (principal brief may not exceed 9,500 words).

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

   For each issue raised by the Petitioner, 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.

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

s/ *Michael J. Norton*
Michael J. Norton
Attorney for Petitioner

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I. ISSUE

[REFRAMED] Whether the court of appeals erred in interpreting Colorado Constitution, Article V, Section 50, to bar the use of state funds to pay for the performance of any induced abortion only to the extent that the performance of an induced abortion is the purpose for which the state makes the payment.

II. STATEMENT OF THE CASE

In 1984, Colorado voters initiated and adopted an amendment to the Colorado Constitution which provides that:

> No public funds[1] 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**….

Colorado Constitution, Article V, Section 50 ("Article V, Section 50") (emphasis added).

In 1999, Petitioner Jane E. Norton ("Mrs. Norton" or "Petitioner") was appointed by then-Colorado Governor Bill Owens to serve as executive director of the Colorado Department of Public Health & Environment ("CDPHE"). CD,[2] pp. 29-30. In that capacity, Petitioner was made aware that State Taxpayer Funds were

[1] "Public funds" are referred to herein as "State Taxpayer Funds."
[2] The record was transmitted from the district court to the court of appeals and then to this Court on a CD. References to this record are designated "CD."

being paid to Respondent Rocky Mountain Planned Parenthood, Inc. ("Planned Parenthood") and that Planned Parenthood appeared to be subsidizing its closely-related abortion-performing affiliate Planned Parenthood Rocky Mountain Services Corporation ("Planned Parenthood Services Corporation"). Petitioner was concerned that, by this arrangement, Planned Parenthood was funneling State Taxpayer Funds to Planned Parenthood Services Corporation so that induced abortions being performed by Planned Parenthood Services Corporation were being subsidized with State Taxpayer Funds in violation of Article V, Section 50. CD, pp. 1-6, 29-30, 237, 307-312.

At Petitioner's direction, CDPHE retained an independent accounting firm (the "Accounting Firm") to audit the organizational and financial relationship between Planned Parenthood and Planned Parenthood Services Corporation. Petitioner directed the Accounting Firm to determine whether this organizational and financial relationship resulted in the use of State Taxpayer Funds by Planned Parenthood to subsidize induced abortions being performed by Planned Parenthood Services Corporation in violation of Article V, Section 50.

The Accounting Firm determined that Planned Parenthood Services Corporation performed induced abortions, that its purported separation from Planned Parenthood was a legal fiction, and that Planned Parenthood Services Corporation was essentially the alter ego of Planned Parenthood. The Accounting Firm determined

that, while Planned Parenthood and Planned Parenthood Services Corporation were each separate Colorado corporations, Planned Parenthood Services Corporation occupied space and performed its induced abortions in medical and office space owned and paid for by Planned Parenthood. The Accounting Firm also determined that, in the performance of induced abortions, Planned Parenthood Services Corporation used (a) medical and administrative personnel which was hired and paid for by Planned Parenthood and (b) medical and office equipment which was owned and paid for by Planned Parenthood. The Accounting Firm determined that, because Planned Parenthood Services Corporation did not pay Planned Parenthood fair market value for its use of these Planned Parenthood assets, the effect of this relationship and arrangement was that Planned Parenthood was subsidizing Planned Parenthood Services Corporation in the performance of induced abortions and thus Article V, Section 50 was being violated.

Based on these facts and circumstances, the Accounting Firm's audit, and the legal opinion of CDPHE's then-legal counsel,[3] Petitioner, in her capacity as executive director of CDPHE, determined that State Taxpayer Funds being paid to Planned Parenthood were subsidizing induced abortions performed by Planned Parenthood Services Corporation. Petitioner also determined that such subsidization

[3] CDPHE's then-legal counsel was Cynthia S. Honssinger (now Cynthia S. Coffman). Ms. Coffman is the current Attorney General for the State of Colorado. CD, pp. 229, 237, 307-310.

constituted the use of State Taxpayer Funds to "directly or indirectly" pay for induced abortions in violation of Article V, Section 50. CD, pp. 1-6, 29-30, 229, 237, 307-312.

Following her determination, Petitioner, in her capacity as executive director of CDPHE, informed Planned Parenthood that it could no longer receive State Taxpayer Funds unless it separated its operations, personnel, and facilities from the operations, personnel, and facilities of Planned Parenthood Services Corporation so that there was no further subsidization by Planned Parenthood of Planned Parenthood Services Corporation and therefore of induced abortions. CD, pp. 1-6, 29-30, 237, 307-312, 318. Planned Parenthood refused to take this requested action. Planned Parenthood also refused to require that Planned Parenthood Services Corporation pay Planned Parenthood the fair market value of the Planned Parenthood's assets Planned Parenthood Services Corporation used in performing induced abortions.

Therefore, in early 2002, Petitioner, in her capacity as executive director of CDPHE, thereupon ordered that, to comply with Article V, Section 50, CDPHE and other State government agencies must cease paying State Taxpayer Funds to Planned Parenthood (the "CDPHE Directive"), which they did in early 2002. CD, p. 4-6, 29, 30, ¶¶17-19, 318.

From early 2002 to early 2007, State agencies, including the State Defendants, complied with the CDPHE Directive and did not pay State Taxpayer Funds to Planned Parenthood. During this time (or at any time thereafter), there was no legislation enacted by the Colorado General Assembly which overturned the CDPHE Directive. In addition, there is no public record of any prior or subsequent analysis, such as that made by Petitioner and the Accounting Firm (or by any other State government agency), of the use of State Taxpayer Funds to "directly or indirectly" pay for or subsidize induced abortions.

In about 2007, without any legislative authority, without an opinion of counsel, and apparently for political reasons, Colorado's then-Governor Bill Ritter ignored Article V, Section 50 and the CDPHE Directive and ordered State government agencies, including CDPHE and the other State Defendants, to resume making payments of State Taxpayer Funds to Planned Parenthood. CD, pp. 4-6, 30, ¶¶ 21, 22, pp. 229, 230, 236, 237, 241, 251, 252, 282-284, 307-310; DC-Transcript pp. 29-30, line 25 to line 21.

At the time of then-Governor Ritter's decision (or at any time since the CDPHE Directive), there had been no change in the subsidization relationship between Planned Parenthood and Planned Parenthood Services Corporation. From 2007 to the present, Planned Parenthood has continued to receive State Taxpayer Funds, Planned Parenthood Services Corporation has continued to perform induced

abortions, and Planned Parenthood has continued to subsidize Planned Parenthood Services Corporation and thus the performance of induced abortions by providing Planned Parenthood Services Corporation, without fair market reimbursement, building and medical facilities, medical equipment and supplies, and medical staff and personnel owned and paid for by Planned Parenthood. CD, pp. 29, ¶13, 30, ¶¶ 20-22, 33, ¶34.

On August 11, 2014, the district court dismissed Petitioner's complaint [4] ("Complaint") on grounds that Petitioner had "fail[ed] to identify a specific abortion service that was supported with State funds" and therefore had failed "to allege a violation of Colorado's Abortion Funding Prohibition Amendment." CD, pp. 378-388. The district court, ignoring Article V, Section 50's express term "indirectly," effectively concluded that unless the specific "*purpose*" for which an expenditure of State Taxpayer Funds was made was an induced abortion, Article V, Section 50 could not be violated.

[4] Petitioner's Complaint does not challenge the use by the State Defendants of public funds, whether paid to Planned Parenthood or another, as Colorado's required match under the federal Title XIX-Medicaid program or even to administer the federal Medicaid program. Nor does the Complaint implicate the so-called Medicaid free-choice-of-provider requirements of the federal Title XIX-Medicaid program. *See* 42 U.S.C. § 1396a(23)(A). While decisions in other federal circuit courts of appeals have dealt with these issues, Petitioner's Complaint does not raise these issues. *See, e.g., Planned Parenthood of Indiana, Inc. v. Comm'r of the Ind. State Dept. of Health*, 699 F.3d 962, 978 (7th Cir.2012), *cert. denied* 133 S. Ct. 2736 (2013); *Planned Parenthood Arizona v. Betlach*, 727 F.3d 960 (9thCir.2013), *cert. denied*, 134 S. Ct. 1283 (2014).

Petitioner appealed this district court decision to the court of appeals. On January 14, 2016, the court of appeals[5] affirmed the district court decision. Again focusing on the "*purpose*" of the expenditure of State Taxpayer Funds, the court of appeals held that the "language [of Article V, Section 50] places the focus on the purpose for which payments were made. . . . [and that, therefore] section 50 prohibits the State from making payments that are made *for the purpose of* compensating someone for performing an induced abortion." *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2016 COA 3, ¶2 (Colo.App.2016) (emphasis in original). As had done the district court before it, the court of appeals conflated Article V, Section 50's express term "indirectly" with its express term "directly," thereby reading the term "indirectly" out of Article V, Section 50 and concluded that unless the specific "*purpose*" for which an expenditure of State Taxpayer Funds was made was an induced abortion, Article V, Section 50 could not be violated.

Article V, Section 50's "directly" prong is clear and unambiguous. It bars the use of State Taxpayer Funds to "pay or otherwise reimburse, . . . **directly** . . . any person, agency or facility for the performance of any induced abortion." Article V, Section 50 (emphasis added). Article V, Section 50's "directly" prong therefore bars, using the language of the court of appeals' decision, "payments . . . made *for the purpose*

[5] The court of appeals opinion is referred to herein as "CA" and the specific paragraph is then cited.

of compensating someone for performing an [induced] abortion." *Norton*, 2016 COA 3CA at ¶2 (emphasis in original).

Article V, Section 50's "indirectly" prong is clear and unambiguous. It bars the use of State Taxpayer Funds to "pay or otherwise reimburse, . . . **indirectly** . . . any person, agency or facility for the performance of any induced abortion." Article V, Section 50 (emphasis added). Under Article V, Section 50's "indirectly" prong, the specific *purpose* for which the State makes the payment is irrelevant. Article V, Section 50's "indirectly" prong bars funneling State Taxpayer Funds through one entity, *i.e.*, Planned Parenthood, to pay for or subsidize induced abortions performed by a related entity, *i.e.*, Planned Parenthood Services Corporation. Because money is fungible, it matters not that the stated "*purpose*" of the payment of State Taxpayer Funds was to pay "directly" for something other than an induced abortion. All that matters is whether State Taxpayer Funds, in view of the foregoing facts and circumstances and the plain language of Article V, Section 50, are used to "indirectly" pay for or subsidize induced abortions. That is precisely what Petitioner's Complaint alleges has been and is happening with State Taxpayer Funds.

III. SUMMARY OF ARGUMENT

The court of appeals erred in interpreting Colorado Constitution, Article V, Section 50, to bar the use of State Taxpayer Funds to pay for the performance of an

induced abortion only to the extent that the performance of an induced abortion is the specific *purpose* for which the State makes the payment.

The goals and purposes of the proponents of Article V, Section 50 were clear and unambiguous. The language of Article V, Section 50 is clear and unambiguous. The court of appeals, like the district court before it, conflated Article V, Section 50's words "directly" and "indirectly" and read the term "indirectly" out of Article V, Section 50 so that the term "indirectly" has no meaning.

In both *Taxpayers for Public Education v. Douglas County School District,* 351 P.3d 461 (Colo.2015) (*"Taxpayers for Public Education"*) and *Keim v. Douglas County School District,* 2015 COA 61 (Colo.App.2015), neither the Colorado Supreme Court or the Court of Appeals had any problem in understanding and applying the term and concept "indirect" to the expenditure of State Taxpayer Funds. That same analysis applies here.

The will of the people, which this Court must effectuate, supports Petitioner's position. The CDPHE Directive to defund Planned Parenthood is entitled to deference and put both the State Defendants and Planned Parenthood on notice of their post-2007 violations of Article V, Section 50 so that those violations cannot be deemed a "misunderstanding" of the meaning and effect of Article V, Section 50.

The allegations of Petitioner's Complaint that State Taxpayer Funds have been and are being used to "indirectly" pay for or subsidize induced abortions, which

allegations must be accepted as true, require a fact-intensive inquiry. Therefore, the decision of the court of appeals must be reversed and this case must be remanded to the district court for further proceedings.

IV. STANDARD OF REVIEW

The interpretation of a constitutional provision is a question of law reviewed *de novo*. *Arthur v. City and County of Denver*, 198 P.3d 1285, 1287 (Colo.App.2008).

Colorado courts are to give the language of our Constitution its "ordinary and common meaning" and to give "effect to every word and term contained therein, whenever possible." *Bd. of Cnty. Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273 (Colo.2001). If the language "is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written." *In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo.1996). "[I]n doing so, technical rules of construction should not be applied so as to defeat the objectives sought to be accomplished by the provision under consideration." *Cooper Motors v. Bd. of Cnty. Comm'rs*, 279 P.2d 685, 688 (Colo.1955).

A "court's duty in interpreting a constitutional amendment is to give effect to the will of the people adopting" it. *Great Outdoors Colo. Trust Fund*, 913 P.2d at 538. It is a court's responsibility to ensure that it gives effect to what the voters believed the constitutional amendment to mean when they accepted it as their fundamental

law, considering the natural and popular meaning of the words used. *Cerveny v. City of Wheat Ridge*, 888 P.2d 339, 341 (Colo.App.1994). Therefore, in interpreting a constitutional amendment that was adopted by popular vote, courts must determine what the people believed the language of the constitutional amendment meant when they voted it into law. *Id.* (citing *Urbish v. Lamm*, 761 P.2d 756 (Colo.1988), *rev'd on other grounds* 913 P.2d 1110 (Colo.1996); *Havens v. Bd. Of County Comm'rs*, 924 P.2d 517 (Colo.1996)). Courts must give effect to the intent of the provision, must give words their plain meaning, and must "read applicable provisions as a whole, harmonizing them if possible." *Lobato v. State*, 304 P.3d 1132, 1138 (Colo.2013); *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo.2006).

V. ARGUMENT

A. Article V, Section 50 is Clear and Unambiguous and Must Be Declared and Enforced As Written.

1. Principles Used to Interpret Colorado Constitutional Provisions.

Our state "constitution derives its force . . . from the people who ratified it, and their understanding of it must control. This [understanding] is to be arrived at by construing the language[] used in the instrument according to the sense most obvious to the common understanding . . . Constitutional provisions must be declared and enforced as written' whenever their language is 'plain' and their meaning is 'clear.'" *Taxpayers for Public Education*, 351 P.3d at 471 (citing *People v. Rodriguez*, 112 P.3d 693, 696 (Colo.2005)).

Provisions contained in the Colorado constitution are to be interpreted as a whole with effect given to every term contained therein. Wherever possible, a court must give effect to every word of the constitutional provision with an eye to the object which the provision as a whole is meant to secure. *Havens*, 924 P.2d at 523 (citing *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 867 (Colo.1995) and *In re Estate of Hill*, 713 P.2d 928, 930 (Colo.App.1985)). Colorado courts are not at liberty to add or subtract words from a statute, but must construe the statutory language as enacted. Courts must presume that the words in a constitutional enactment were not used idly. *Justus v. State*, 336 P.3d 202 (Colo.2014); *Youngs v. Industrial Claim Appeals Office*, 316 P.3d 50 (Colo.App.2013).

Only where constitutional provisions are *ambiguous*, should courts favor a construction that harmonizes different constitutional [or statutory] provisions. *Great Outdoors Colo. Trust Fund*, 913 P.2d at 538. Even then, a court must consider the purposes which the law was designed to accomplish and the consequences that would flow from alternate constructions, and then adopt the construction that results in harmony rather than inconsistency. *Havens*, 924 P.2d at 523 (citing *Colorado-Ute Elec. Ass'n, Inc. v. Public Utils. Comm'n of Colo.*, 760 P.2d 627, 635 (Colo.1988)).

If this Court should conclude that the terms "directly" and "indirectly" are ambiguous or "susceptible to more than one interpretation," then the Court may (and, indeed, should) turn to other materials, such as the Bluebook, to ascertain the intent

of the voters. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo.2004). *See also Grossman v. Dean*, 80 P.2d 952, 962 (Colo.App.2003) (the Blue Book is a helpful source equivalent to the legislative history of a proposed amendment).

Where a section of the Colorado Constitution implies limitations on rights or on the legislature's authority, "it becomes highly important to ascertain, if that may be done, what the framers of the Constitution really had in mind, and actually intended to cover by the enactment of this provision. *Schwartz v. People*, 104 P. 92, 98 (Colo.1909). To do so, the court must read the record of the constitutional convention's proceedings and look to "the attitude of the members of that body, as shown by the record concerning the then existing laws on that subject." *Id.*

2. **The Purposes of the Proponents of Article V, Section 50 Were Clear and Unambiguous.**

A review of the 1984 Blue Book makes it clear that the voters' primary concern in enacting Article V, Section 50 was to establish "a public policy for the state of Colorado that public funds are not to be spent for the destruction of prenatal life through abortion procedures," and to make "a value judgment favoring childbirth over abortion and implementing that judgment by the allocation of public funds." *See Analysis of 1984 Ballot Proposals*, Colorado General Assembly's Legislative Council (the "1984 Blue Book"), p. 6; CD, pp. 99-100.

Proponents of Article V, Section 50 did not want Colorado to lend its "imprimatur" to the "direct or indirect" funding of induced abortions. *See Maher v.*

Roe, 432 U.S. 464, 474 (1977) (There is "no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."); *see also Harris v. McRae*, 448 U.S. 297, 316-18, 324 (1980) (upholding a federal statute, *i.e.*, the "Hyde Amendment," which prohibits the use of Medicaid funds for certain abortions). A refusal to fund the exercise of a constitutional right, without more, is not an infringement on that right. *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'") (citation omitted).

In *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458 (8th Cir.1999), the Eighth Circuit faced a virtually identical situation (though with a state statute as opposed to a constitutional provision) as is the case here. In 1996, the Missouri legislature decided to prohibit organizations that provided abortion services from receiving family-planning funds on grounds that abortion service providers like Missouri Planned Parenthood were receiving *indirect*

benefits from family-planning funds through, among other things, shared revenue, shared marketing expenses, and other shared fixed expenses. As is the case here, Missouri Planned Parenthood performed family planning services and, using the same facilities and its abortion affiliate using, among other things, the same marketing materials, performed abortions. The Missouri statute provided, *inter alia*, that "none of these [State Taxpayer] funds may be expended to *directly or indirectly* subsidize abortion services." *Id.*, 167 F.3d at 463 (citing *Rust*, 500 U.S. at 180-81) (requiring abortion services to be physically and financially separate from government-funded program) (emphasis added).

The Eighth Circuit, in upholding the constitutionality of the Missouri statute designed to prevent the "imprimatur" of the state from being given to abortion providers, found that "[n]o subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds. *Id.; see also Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983).

That is just how Petitioner, in her capacity as executive director of CDPHE, interpreted and applied Article V, Section 50 to the payment of State Taxpayer Funds to Planned Parenthood and, in turn, to Planned Parenthood Services Corporation. Through the CDPHE Directive, Petitioner requested that Planned Parenthood, as a

condition of continued receipt of State Taxpayer Funds, separate its facilities, equipment, personnel, and financial books and records from Planned Parenthood Services Corporation. When Planned Parenthood refused to do so, Petitioner ordered State government agencies to cease making payments of State Taxpayer Funds to Planned Parenthood to avoid a violation of Article V, Section 50.

While the constitutionality of Article V, Section 50 is not at issue, it is clearly a permissible and legitimate public policy goal, as Article V, Section 50's proponents argued in the 1984 Blue Book, to limit or even prohibit the use of State Taxpayer Dollars to pay for or subsidize abortions. The 1984 Blue Book articulated that it was the public policy of the State of Colorado to assure "that public funds are not to be spent for the destruction of prenatal life through abortion procedures but that public funds may be spent to protect both the life of a pregnant woman and her unborn child." *1984 Blue Book*, at 7.

3. The Language of Article V, Section 50 is Clear and Unambiguous.

Importantly, the question is not whether one supports or opposes abortion. That the State Defendants may have "acted with a good heart [in subsidizing induced abortions] does not mean that [they] can choose a solution . . . that violates Colorado's Constitution." *Taxpayers for Public Education v. Douglas County School District*, 356 P.3d 833, 855 (Colo.App.2013) ("*CA Taxpayers for Public Education*"), Bernard, J., dissenting, rev'd *Taxpayers for Public Education*.

Rather, the question is whether the State Defendants and other State agencies can ignore the clear and unambiguous language of Article V, Section 50 that constitutionally bars the use of State Taxpayer Funds to **pay or otherwise reimburse**, either directly or **indirectly**, **any person**, agency or facility **for the performance of any induced abortion**. Article V, Section 50 (emphasis added).

Giving the language of Article V, Section 50 its ordinary and common meaning and giving effect to every word in Article V, Section 50 s this Court must, the language of Article V, Section 50 is plain, its meaning is clear, there is no absurdity resulting from the application of Article V, Section 50 as written. Thus, there is no need to resort to other modes of interpretation to determine its meaning. Article V, Section 50 must be "declared and enforced as written." *Rodriguez,* 112 P.3d at 696.

Article V, Section 50 features broad, unequivocal language forbidding the State from using State Taxpayer Funds to "indirectly" pay for or reimburse another for the performance of induced abortions. Given that Petitioner's Complaint essentially alleges that Planned Parenthood Services Corporation could not survive without Planned Parenthood's financial support, payment of State Taxpayer Funds to Planned Parenthood effectively subsidizes induced abortions performed by Planned Parenthood Services Corporation and Article V, Section 50, as Petitioner determined in her capacity as executive director of CDPHE, has been (and is being) violated.

Nevertheless, even if this Court were to conclude that the term "indirectly" is ambiguous, the Blue Book provides evidence that Colorado voters intended Article V, Section 50 to be interpreted broadly and in such a manner as to prevent the use of State Taxpayer Funds to pay for or subsidize, whether directly or indirectly, induced abortions. The 1984 Blue Book specifically alerted voters that Article V, Section 50 could prohibit political subdivisions from contracting for any services with agencies or institutions that provided abortion services. Additionally, the 1984 Blue Book utilized the term "subsidize" and noted that under Supreme Court jurisprudence, "taxpayers are not required to subsidize [induced] abortions." *1984 Blue Book*, at 7.

"The apparent intent of the Amendment [Article V, Section 50] was to eliminate all public involvement in the financing of induced abortions. 'Public funds,' in that context must, therefore, be given a broader reading than that given in Colorado cases interpreting such phrase in other contexts." Colorado Attorney General Opinion, AGO 85-2 (1985), fn 2 (citing *Stong v. Industrial Commission*, 204 P. 892 (Colo.1922); *Pensioners Protective Association v. Davis*, 150 P.2d 974 (Colo.1944)). *See Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo.1988) ("Since the Attorney General's opinion is issued pursuant to statutory duty, the opinion is entitled to respectful consideration as a contemporaneous

interpretation of the law by a governmental official charged with the responsibility of such interpretation.") (citations omitted).

In giving effect to the will of the people adopting Article V, Section 50, this Court must find that, though the "*purpose*" of the expenditure may have been catalogued by the State Defendants as something else, the effect of the expenditure of State Taxpayer Funds was to "indirectly" pay for or subsidize induced abortions.

B. State Taxpayer Funds Were Used to "Indirectly" Pay for Induced Abortions.

The word "indirect" means: "[n]ot direct in relation or connection; not having an immediate bearing or application; not related in the natural way. **Circuitous**, not leading to aim or result by plainest course or method or obvious means, **roundabout**, not resulting directly from an act or cause but more or less **remotely connected with or growing out of it**." *Black's Law Dictionary* (6th ed.1990) (emphasis added). As the court of appeals found in *Keim*, the term "indirect" has an everyday, simple, understandable, and ordinary meaning, *i.e.*, "not proceeding straight from one point to another." *Keim*, 2015 COA 61 at ¶34 (citing *Webster's Third New International Dictionary* 1151 (2002)).

This is precisely what Petitioner's Complaint affirmatively alleges – that payments made to Planned Parenthood by the State Defendants "indirectly" – that is, not direct, not straightforward, roundabout, and more or less remotely connected to – subsidized induced abortions in violation of Article V, Section 50. There is no

reason not to utilize those plain, ordinary, everyday, simple, and understandable meanings in determining the meaning of the term "indirectly" in Article V, Section 50. *Lobato,* 304 P.3d at 1138.

C. The Court of Appeals, Like the District Court Before It, Conflated Article V, Section 50's Terms "Directly" and "Indirectly" So That the Term "Indirectly" Has No Meaning.

The district court, with virtually no supporting facts, held that, unless the *purpose* for which State Taxpayer Funds had been expended was to pay for an induced abortion, Article V, Section 50 could not be violated. (CD, pp. 382-383). The district court then created a strained definition of the term "indirect" that effectively conflated Article V, Section 50's terms "directly" with "indirectly," thereby reading the term "indirectly" out of Article V, Section 50.

The district court's definition and application of the word "indirectly" contradicts basic principles of constitutional construction that every word in a constitutional provision is to be given its plain and ordinary meaning, and not to be construed in a way that renders any part of it meaningless. *See Mayo v. People*, 181 P.3d 1207, 1210 (Colo.App.2008) (citation omitted); *Danielson*, 139 P.3d 688.

It was error for the district court to conflate Article V, Section 50's terms "directly" and "indirectly" and, in so doing, to make findings of "facts" contrary to those alleged in Petitioner's Complaint and either not disputed or not yet determined from discovery. *See Telsmith, Inc. v. Bosch Rexroth Corp*., 945 F. Supp. 2d 1012,

1016 (E.D.Wis.2013) (direct/indirect inquiry is "fact intensive"); *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 554 (D.C.Cir.1999) (indirect affiliation a "fact intensive inquiry").

The court of appeals, using slightly different verbiage, *i.e.*, the "language [of Article V, Section 50] requires that the *purpose* for which the State makes the payment be analyzed", made the same mistake as had the district court before it. CA, ¶2 (emphasis added). The court of appeals ignored the plain language of Article V, Section 50 and its legislative history and conflated Article V, Section 50's terms "directly" and "indirectly" with the result that the term "indirectly" has no meaning and has been read out of Article V, Section 50.

In so doing, the court of appeals posited an absurd "strawman argument" that it said would result if Petitioner's "view" of Article V, Section 50 were to be upheld. Ignoring the fact that the State Defendants, with knowledge of the CDPHE Directive, paid State Taxpayer Funds to Planned Parenthood, the court of appeals said implementing Petitioner's "view" of Article V, Section 50 would result in a violation of Article V, Section 50 if the State government were to pay salaries to State government employees who then, without the State's knowledge, made "a donation to Services." *Norton*, 2016 COA 3 at ¶24.

This argument is unavailing for the following reasons:

First, Article V, Section 50 clearly applies to the use of public funds to subsidize induced abortions by "the State of Colorado, its agencies or political subdivisions." It does not apply to the personal use of salaries by State employees who are entitled to spend their earned wages as they see fit and without informing the State. Of importance in this regard is a 1985 Colorado Attorney General Opinion that opined Article V, Section 50 applied to and prohibited the inclusion of induced abortion coverage in health insurance benefits provided by the State to its employees. In this opinion, the Colorado Attorney General stated that "'[p]ublic funds' within the meaning of the [Amendment], are involved in the monthly *employer* contribution toward the cost of providing employee health insurance coverage. The payments made by the *state as employer* originate in the general revenue fund accounts and specific cash fund accounts of the various state departments, agencies and institutions. . . . Such contributions are public moneys earmarked for a particular purpose, not payments to employees over which such employees have any direct claim." Colorado Attorney General Opinion, AGO 85-2 (1985) (emphasis added).

Here, as was well-known to the Defendants by virtue of the CDPHE Directive, the "purpose" for which State Taxpayer Funds were expended, as alleged in Petitioner's Complaint, was to indirectly pay for or subsidize induced abortions even though the "specific purpose" catalogued by the State Defendants was something else. The Defendants cannot claim that they did not know about the CDPHE

Directive to defund Planned Parenthood on grounds State Taxpayer Funds were "indirectly" used to pay for (or subsidize) induced abortions being performed by Planned Parenthood Services Corporation. The Defendants are bound by terms of Article V, Section 50 as well as by the CDPHE Directive and were on notice that their disregard of the CDPHE Directive could subject them to sanctions, including those sought in Petitioner's Complaint.

Second, the State Defendants clearly did that which Article V, Section 50 specifically prohibits; they knowingly used State Taxpayer Funds to subsidize induced abortions. What is "absurd" is that the State Defendants could pay State Taxpayer Funds to Planned Parenthood knowing that such funds were then being filtered to Planned Parenthood's abortion-performing subsidiary, *i.e.*, Planned Parenthood Services Corporation, a closely related shell entity that appears to own no assets and has no real economic substance or independent existence, and thus were subsidizing induced abortions performed by Planned Parenthood Services Corporation. Surely, this is not a result that is inherent in the plain meaning of Article V, Section 50. Nor was it a result even conceivably contemplated by the Coloradans who sponsored and approved Article V, Section 50. In fact, the Coloradans who sponsored and approved Article V, Section 50 specifically sought to bar the use of State Taxpayer Funds to "subsidize" induced abortions.

If the court of appeals decision is permitted to stand, it will provide a roadmap to Planned Parenthood as well as to any other organization on how to circumvent constitutional or statutory prohibitions on the expenditure of State Taxpayer Funds. In that event, all such entities need do to appear to be in compliance with such prohibitions is to set up an alter ego shell entity into which the "parent," which receives State Taxpayer Funds, funnels money to the shell alter ego entity so it can then perform activities forbidden by State constitutional or statutory provisions.

The court of appeals made no effort to ascertain the intent of the voters as required by this Court's precedents, to reconcile any ambiguity in the terms "directly" and "indirectly" (though there is none), or to give substance and meaning to the word "indirectly." *See Davidson*, 83 P.3d at 654; *Grossman*, 80 P.2d at 962 (*citing Macravey v. Hamilton*, 898 P.2d 1076 (Colo.1995).

Lastly, the court of appeals ignored this Court's decision in *Taxpayers for Public Education* and a prior court of appeals decision in *Keim*. These decisions support interpretation and application of Article V, Section 50 as interpreted and applied by the Petitioner and as set forth in Petitioner's Complaint.

Each of these precedents would have resulted in a different outcome in the court of appeals if they had been properly considered and applied there.

D. In *Taxpayers for Public Education* and in *Keim*, Colorado Courts Had No Problem in Understanding and Applying the Term "Indirect" to the Expenditure of State Taxpayer Funds.

In *Taxpayers for Public Education*, this Court, in a plurality opinion,[6] concluded that the Douglas County School District Choice Scholarship Pilot Program ("CSP") violated Article IX, Section 7 of the Colorado Constitution. The majority stated, "To be sure, the CSP does not explicitly funnel money directly to religious schools, instead providing financial aid to students." *Id.* 351 P.3d at 470. In other words, the "purpose" of the CSP as this Court saw it was to provide financial aid to students.

The majority added that "section 7's prohibitions are not limited to *direct* funding. Rather, section 7 bars school districts from 'pay[ing] from any public fund or moneys whatever, anything in aid of any 'religious institution. . ." *Id.* (emphasis added). In other words, the "result" (or "real purpose") of the expenditure of public funds was the "indirect" funneling of public funds to aid religious institutions in violation of Article IX, Section 7 of the Colorado Constitution.

The plurality opinion specifically cited Judge Bernard's court of appeals dissent in *CA Taxpayers for Public Education* with approval. The Court stated that, in *CA Taxpayers for Public Education*, Judge Bernard "asserted that article IX, section 7

[6] The plurality resulted from Justice Marquez's disagreement with the majority's conclusion that the Petitioners lacked taxpayer standing. Otherwise, Justice Marquez agreed with and joined the majority in determining "that the CSP is a patently unauthorized use of public funds . . ." *Taxpayers for Public Education*, 351 P.3d at 478.

of the Colorado Constitution 'prohibits public school districts from channeling public money to private religious schools.'" *Taxpayers for Public Education,* 351 P.3d at 469. In the Court's plurality opinion, Chief Justice Rice added that "Judge Bernard then analogized the CSP to 'a pipeline that violates this direct and clear constitutional command' . . . [and] concluded that section 7 renders the CSP unconstitutional." *Id.*

In a clear exposition on the "direct/indirect" or "purpose" dichotomy, the plurality opinion stated:

> Article IX, section 7 of the Colorado Constitution prohibits school districts from aiding religious schools. The CSP has created financial partnerships between the District and religious schools and, in so doing, has facilitated students attending such schools. This constitutes aid to religious institutions as contemplated by section 7. Therefore, we hold that the CSP violates section 7. Accordingly, we reverse the judgment of the court of appeals and remand the case to that court with instructions to return the case to the trial court so that the trial court may reinstate its order permanently enjoining the CSP.

Id. at 475.

Interestingly, Justice Eid, in dissent, observed that the term "*indirect*" does not appear in Article IX, section 7 of the Colorado constitution thus making the "purpose" for which the expenditure is made a key factor. She stated:

> [T]he language of article IX, section 7, does not compel this result. It prohibits a government entity from "mak[ing] any appropriation or pay[ing] from any public fund or moneys whatever . . . to help support or sustain any [church or sectarian] school . . . whatsoever." It thus invalidates a public expenditure made" to help support or sustain" church or sectarian schools. It does not suggest, as the plurality would

> have it, that any program that provides public money for other *purposes*--for example, to assist students--is constitutionally suspect simply because the funds *indirectly or incidentally benefit* church or sectarian schools. Such a reading is contrary to *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1083 (Colo.1982), in which we upheld a state grant program similar to the CSP on the ground that "the aid is designed to assist the student, not the institution."

Id. at 478 (emphasis added).

Clearly, the majority, as did the dissent, understood what "indirect" meant in the context of "channeling" public money through the CSP program to private religious schools. Here, just as was determined in *Taxpayers for Public Education,* payments of State Taxpayer Funds to Planned Parenthood amount to a "pipeline" by which State Taxpayer Funds were paid to Planned Parenthood Services Corporation and which subsidized induced abortions in violation of "a direct and clear constitutional command." *CA Taxpayers for Public Education*, 356 P.3d at 855, Bernard, J., dissenting, rev'd *Taxpayers for Public Education.*

If the Court found an indirect flow or funneling of funds to violate the Constitution where the term "indirect" is not even mentioned in the constitutional provision at issue, how much more should it find that the Constitution is being violated here. Article V, Section 50 specifically prohibits use of State Taxpayer Funds to "indirectly" pay or reimburse for induced abortions. Petitioner's Complaint alleges that an abortion provider, *i.e.*, Planned Parenthood Services Corporation, is being "indirectly" funded by Planned Parenthood in the face of an express

prohibition in the Colorado Constitution. If anything, the violation is even more egregious, for none of the CSP scholarship recipients lived in, shared staff with, or shared supplies with any of the religious schools they planned to attend.

Similarly, in *Keim*, the court of appeals, in considering an alleged Fair Campaign Practices Act contribution violation, had no difficulty understanding and applying the concept of "*indirect*" payments and subsidization. The court of appeals, noting that "*indirect*" is defined as "not proceeding straight from one point to another," held that "*indirectly* . . . involve[s] providing something of value to someone other than the candidate himself or herself but with the intention that the candidate will eventually receive or make use of that thing of value." *Keim*, 2015 COA 61 at ¶¶ 34 (citing *Webster's Third New International Dictionary* 1151 (2002)) and 38 (emphasis added).

In *Keim*, the court of appeals listed several illustrations of the term "indirect" to demonstrate the consistency of the plain meaning of the term "indirect." One particularly relevant illustration was the Internal Revenue Service's regulation concerning a taxpayer gift to a corporation or other business entity. The IRS regulation specifies that, "[i]f a taxpayer makes a gift to a corporation or other business entity intended for the eventual personal use or benefit of an individual who is an employee, stockholder, or other owner of the corporation or business entity, the gift generally will be considered as made indirectly to such individual." *Keim*, 2015

COA 61 at ¶37. However, the court of appeals added that "we need not develop an all-encompassing definition of the word "indirectly," . . . Rather, applying the plain meaning of the terms used in the present context, we need only note that indirectly giving something of value to a candidate must, at a minimum, involve providing something of value to someone other than the candidate himself or herself but with the intention that the candidate will eventually receive or make use of that thing of value." *Id.* at ¶38.

This is precisely what Petitioner's Complaint alleges happened here. The State Defendants, fully aware of the CDPHE Determination and without any legislative authority or advice of counsel, resumed payments of State Taxpayer Funds to Planned Parenthood *intending* them to be used to subsidize induced abortions,

Taxpayers for Public Education, CA Taxpayers for Public Education, and *Keim* each recognizes that "money is fungible" and that every dollar is freely interchangeable with every other dollar. *See Sabri v. United States*, 541 U.S. 600, 606 (2004). (CD, p. 245); *Rush University Medical Center v. Leavitt*, 535 F.3d 735, 743 (7th Cir.2008) ("[T]he fact remains that money is fungible."); *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 698 (7th Cir.2008) (same).

Here, the State Defendants paid (and are still paying) State Taxpayer Funds to Planned Parenthood with full knowledge that Article V, Section 50 is being violated. The Defendants knew of the CDPHE Directive. They knew that Planned Parenthood,

using, in part, State Taxpayer Funds, were (and are) funneling such funds to Planned Parenthood Services Corporation by providing Planned Parenthood Services Corporation assets at below fair market value so as to enable Planned Parenthood Services Corporation to perform induced abortions. Whether the money comes out of one "pocket" or the other, the money is clearly coming out of the pockets of Colorado taxpayers and taxpayers are indirectly (or possibly even directly) subsidizing induced abortions. The CDPHE Directive put all Defendants on notice that resumption of the payment by the State Defendants of State Taxpayer Funds to Planned Parenthood in about 2007 resulted in the subsidization of induced abortions in violation of Article V, Section 50.

E. The CDPHE Directive to Defund Planned Parenthood is Entitled to Deference and Put Both the State Defendants and Planned Parenthood on Notice of Their Intentional Violation of Article V, Section 50.

Planned Parenthood refused to comply with Petitioner's 2001 demand that it separate its operations from the operations of Planned Parenthood Services Corporation in order to be eligible to continue to receive State Taxpayer Funds without violating Article V, Section 50. As a result of that refusal, in early 2002, Petitioner, in her capacity as executive director of CDPHE, ordered that the State Defendants and other State agencies cease paying State Taxpayer Funds to Planned Parenthood unless or until Planned Parenthood and Planned Parenthood Services Corporation complied with the CDPHE Directive and fully separated, physically,

personnel-wise, and financially, the operations of Planned Parenthood Services Corporation from the operations of Planned Parenthood.

Given that Article V, Section 50 was designed to declare and enforce a principle of public policy, Article V, Section 50 ought to receive the most liberal interpretation available. *Colorado for Family Values v. Meyer,* 936 P.2d 631 (Colo.App.1997). Petitioner's application of Article V, Section 50 when she was executive director of CDPHE was (and is) reasonable and correct. *Planned Parenthood of Mid-Missouri,* 167 F.3d at 463 ("No subsidy [of an abortion affiliate] will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.").

Moreover, while a reviewing court is not bound by an agency's statutory construction, a reviewing court must give deference to the reasonable interpretations of an administrative agency authorized to enforce a particular statute. *See Bd. of Cnty. Comm'rs v. Colo. Pub. Util. Comm'n*, 157 P.3d 1083, 1088 (Colo.2007); *Carter v. City and County of Denver,* 160 P.2d 991 (Colo.1945); *Colo. Ethics Watch v. City & Cnty. of Broomfield*, 203 P.3d 623, 624 (Colo.App.2009) (discusses concept of "conflation" of terms).

The 2007 decision of Colorado's then-Governor Bill Ritter to resume payments of State Taxpayer Funds to Planned Parenthood was, as Petitioner alleges in her

Complaint, an arbitrary political decision made without any legislative authority or opinion of counsel. Arguably, therefore, this decision is not entitled to deference. *See Colo. Ethics Watch*, 203 P.3d at 625-26 ("An agency decision will be sustained unless it is arbitrary or capricious, is unsupported by the evidence or contrary to the law. . . . [T]o set aside an agency's determination on the ground that it is arbitrary or capricious, a reviewing court must be convinced based on the record as a whole that there is no substantial evidence to support the agency's determination.") (citations omitted).

VI. CONCLUSION

The terms of Article V, Section 50 are clear and unambiguous. Article V, Section 50 prohibits the use of State Taxpayer Funds to pay, *directly or indirectly*, for induced abortions. The court of appeals, as had the district court before it, erred by:

- Conflating Article V, Section 50 terms "directly" and "indirectly."
- Giving no meaning to Article V, Section 50's term "indirectly" and thereby reading it out of Colorado's Constitution.

Planned Parenthood refused to comply with the CDPHE Directive. Petitioner, in her capacity as executive director of CDPHE, thereupon defunded Planned Parenthood and its subsidization of Planned Parenthood Services Corporation. The 2007 decision to ignore Article V, Section 50 and the CDPHE Directive resulted in the knowing and intentional violation by the Defendants of Article V, Section 50.

This Court should reverse the judgment of the court of appeals and remand the case to that court with instructions that it return the case to the district court for further proceedings.

Dated this 28th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 28th day of December, 2016, a true and correct copy of the foregoing ***Petitioner's Opening Brief*** was served on the following parties or their counsel electronically via ICCES to:

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