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Independent Ethics Commission  
1300 Broadway, Suite 240  
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**RE: Proposed Position Statement Regarding Home Rule Entities**

To whom it may concern:

I represent the Mayor of Glendale, Mike Dunafon. In this capacity, I have litigated the issue of how Article XXIX applies to home rule jurisdictions for over five years. Having briefed and argued these issues on multiple occasions before the IEC and Colorado's trial and appellate courts, I write to provide perspective on the IEC's proposed position statement regarding the application of Section 7, Article XXIX to home rule municipalities.

Upon careful review of the proposed position statement, the IEC should not adopt it. While the proposed position statement presents a more accurate understanding of Article XXIX than the now-rescinded Position Statement 16-01, the proposed position statement still fails to comply with the plain and clear constitutional directive contained in Section 7, Article XXIX. Not only does the proposed position conflict with the plain language of Article XXIX, but it also claims powers not constitutionally delegated to the IEC.

If the IEC adopts and implements the proposed position, it will unconstitutionally limit home rule municipalities' right to self-governance and wrongfully subject home rule officials and employees to IEC jurisdiction. Accordingly, I urge the IEC to reconsider its position and adopt a position that is

consistent with of the plain text of Article XXIX and court cases that have interpreted it. Put another way: So long as a home rule municipality has undertaken to regulate the ethics of public officials, the carve-out in Section 7, Article XXIX applies. The IEC lacks authority to conduct any further analysis of whether or how a home rule municipality regulates its own public officials and employees.

### **The IEC Should Not Adopt the Draft Position Statement**

While the proposed position statement correctly states that home rule municipalities may address the matters contained in Article XXIX by imposing less stringent standards than those set forth in the Article, and correctly states and that the IEC cannot consider the implementation or adequacy of those standards, it is incorrect in its conclusion that a home rule municipality is only exempt under Section 7 of Article XXIX if its laws affirmatively address what the IEC has unilaterally (and subjectively) deemed the “four main components of Article XXIX.” (Draft Stmt., at 2.)

Because the proposed position statement conflicts with the Colorado Constitution and exceeds the IEC’s constitutionally granted authority, it should not be adopted. Instead, the IEC should adopt a position statement indicating that a home rule municipality or county is not subject to Article XXIX if the home rule municipality or county has adopted *any* ethical code. This position is consistent with the text and purpose of the Colorado Constitution, is reflected in persuasive case law, and protects the rights of home rule municipalities and counties.

#### A. **The Proposed Position Statement Violates the Colorado Constitution.**

Article XXIX of the Colorado Constitution was adopted by the voters in 2006, and grants the IEC the authority to investigate and adjudicate alleged ethics violations by various government officials

and employees. Colo. Const. art. XXIX § 5. But, as the IEC acknowledges in its proposed position statement, this power does not apply to all government officials and employees.

Section 7 of Article XXIX creates an explicit exemption for home rule municipalities if they “have adopted charters, ordinances, or resolutions that address the matters covered by this article.” Colo. Const. art. XXIX § 7. The IEC’s proposed position statement errs in its conclusion that a local charter or ordinance cannot “address” the matters covered unless its codes and charters explicitly and affirmatively address each of what IEC has determined are the four main components of Article XXIX: (1) a gift ban; (2) a complaint and investigative process; (3) a penalty provision or discipline process; and (4) an independent decisionmaker. (Draft Stmt. at 2). Article XXIX does not itself premise Section 7’s carve-out on promulgation of particular types of code or ordinance subjectively identified by the IEC. Indeed, it does not require that a home rule charter implement any of the same requirements or processes contained therein. It requires is that the home rule municipality “address the matters” covered by Article XXIX. Colo. Const. art. XXIX § 7. The flaw in the IEC’s reasoning here is the same as the one present in the IEC’s 2016 Position Statement on this topic. The Colorado Constitution does not permit the IEC to determine whether a home rule municipality qualifies for the carve-out in Section 7, Article XXIX, and the Colorado Constitution does not set any minimum prerequisites for a home rule municipality to avail itself of the jurisdictional carve-out.

A home rule municipality can address the matters covered by Article XXIX in any number of ways. That is the essence of home rule. The word “address” is undefined in Article XXIX and so must be given its ordinary meaning. *See Denver Publ’g Co. v. Bd. Of Cnty. Comm’rs*, 121 P.3d 190, 195 (Colo.

2005) (“undefined words and phrases are read in context and construed literally according to common usage.”). The ordinary meaning of “address” in this context is “to deal with.” (Merriam-Webster Dictionary (<https://www.merriam-webster.com/dictionary/address> (last visited 11/14/23))).

The other operative word in Section 7 is “matters,” which refers to the subject matter that home rule municipalities must address to trigger the carve-out. Again, this word is undefined and thus must be given its ordinary meaning. “Matters” is defined as “the subject or substance of a discourse or writing.” (<https://www.merriam-webster.com/dictionary/matters> (last visited 11/14/2023))). The subject or substance of Article XXIX can be gleaned by its title: “Ethics in Government.” Accordingly, the plain meaning of Section 7 is that Article XXIX does not apply to a home rule municipality or county that has passed codes, ordinances, or charters that deal with ethics in government. In other words, no official or employee from a municipality that has adopted its own ethics code is subject to the proscriptions, penalties, or adjudicative process set forth in Article XXIX.

This interpretation is consistent with the constitutionally established right to municipal self-governance. Article XX, § 6 of the Colorado Constitution grants home rule municipalities “the full right of self-government in both local and municipal matters” and requires that local ordinances “shall supersede . . . state law in conflict therewith.” Colo. Const. art. XX § 6. The ethical standards for local and municipal officials and employees and the enforcement of those standards are local matters. Indeed, Article XX specifically states that home rule municipalities have the right to choose the qualifications and terms of its elected officials and employees, and to impose and enforce its own charters and ordinances. *Id.* Ethical standards are qualifications and terms of elected officials and

employees, and they are imposed and enforced through charters and ordinances. Thus, home rule municipalities have a constitutionally guaranteed right to establish and enforce their own government ethics codes if they so choose.

While these rights *could* be limited by later constitutional amendment, that has not happened. Article XXIX preserves the home rule right to self-governance through the Section 7 home-rule carve out. Section 7 is thus interpreted in conjunction with, and to give effect to, the home rule right of self-governance guaranteed by Article XX. This is accomplished by giving “address” and “matters” their common, ordinary meanings: municipalities and counties that have elected to self-govern, may also elect to self-govern the ethical duties of their elected officials and municipal employees. They may do this by enacting ordinances, codes, or charters that address ethics in government in any manner they so choose. So long as a home rule entity enacts an ordinance establishing that it has decided to self-govern the ethical conduct of its public officials and employees, it may do so in any manner it chooses, and that decision deprives the IEC of jurisdiction.

The proposed position statement is clearly in conflict with these constitutional mandates. Rather than allow home rule entities to pass and enforce their own laws addressing ethics in government, the IEC takes the position that a home rule municipality must enact a gift ban, a complaint and investigation process for ethical violations, and an independent decisionmaker to adjudicate that process. And they interpret these “requirements” subjectively. These requirements impose a statewide ethical mandate on home rule municipalities that is neither contemplated nor

authorized by the Colorado Constitution. The IEC should not adopt the proposed position statement because it directly contradicts the plain language of the Colorado Constitution.

B. The IEC Does not Have the Authority to Determine if A Home Rule Charter or Ordinance Addresses the Matters of Article XXIX.

The IEC is not a court of general jurisdiction with authority to interpret constitutional or municipal law. Rather, the IEC is a constitutionally created quasi-judicial body with limited and enumerated jurisdiction. Section 5 of Article XXIX creates the IEC and grants it the authority to “hear complaints, issue findings, and assess penalties, and also to issue advisory opinions on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law.” Colo. Const. art. XXIX § 5; *See also*, C.R.S. § 24-18.5-101(4). The proposed position statement goes beyond the IEC’s authority to determine “ethics issues” and instead attempts to imbue the IEC with unconstitutional power to make substantive determinations regarding the meaning and effect of home rule charters and ordinances. In effect, this ostensibly vests the IEC with the power to determine home rule municipalities’ rights to self-governance. The IEC has no authority to make such interpretations or determinations.

While the proposed position ostensibly prohibits the IEC from looking at the effect or adequacy of home rule ethics provisions, this has not played out in practice, and is indeed not possible so long as the IEC seeks to impose substantive requirements. For example, the IEC recently applied a similar test to the one enumerated in the proposed position to assert jurisdiction over Mayor Dunafon. Glendale, a home rule municipality, has extensive ethics ordinances including a gift ban, penalties, and an impartial complaint and hearing process. Despite these specific provisions—which the City of Glendale

has successfully utilized to adjudicate ethics complaints specifically—the IEC nevertheless determined, in its subjective judgment, that Glendale did not qualify for the carve-out in Section 7 of Article XXIX because it did not meet the IEC’s stated requirement that the code contain a specifically enumerated complaint and investigatory process.

The IEC reached this conclusion by determining, through statutory analysis, that the process and procedures contained in Glendale’s ethics code were inadequate.<sup>1</sup> The IEC stated that “[w]hile it could be implied, from the reference to ‘complaints,’ that a citizen *could* file a complaint and Glendale *could* conduct an investigation, there are no provisions actually setting forth such a process.” Order, *In re Dunafon* Sept. 6, 2023. In other words, the IEC analyzed the language of the code, recognized that the code “could” be read to contain a process to submit and investigate ethics complaints, but ultimately deferred to their own judgment that the codified process was inadequate because it was not fully enumerated. This type of interpretation and analysis of home rule ordinances is outside the IEC’s limited authority to “hear complaints, issue findings, and assess penalties. . . on ethics issues[.]” Colo. Const. art. XXIX, §5. And in practice, there is simply no way for the IEC to determine if a home rule entity has enacted provisions that satisfy its selected “four main components” without engaging in statutory interpretation and imposing those interpretations on the home rule entity. The IEC’s proposed position statement clearly exceeds the IEC’s constitutional authority.

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<sup>1</sup> Indeed, the IEC complaint against Mayor Dunafon had already been submitted, investigated, and adjudicated through the process set forth in the Glendale ethics code before it was *resubmitted* to the IEC. In other words, the Complaint reached the IEC not because Glendale lacked a process to submit and investigate complaints, but because the complainant did not like that process and sought an improper second bite at the apple.

C. The Proposed Position is Likely to be Invalidated by Colorado Courts.

While binding case law on point does not yet exist, non-binding judicial analysis of the home rule carve-out in Article XXIX strongly indicates that this proposed position statement is unconstitutional. A district court interpreting Section 7 of Article XXIX concluded that it exempts any home rule municipality that adopts an ethics code. *Dunafon v. Jones*, 18CV32664 at \*10 (Denver Dist. Ct., Jan 3, 2019) (“The plain language of Section 7 is clear, and allows for a carve-out for a home rule municipality so long as it adopts rules that deal with ethical standards of conduct.”). This is contrary to the IEC’s position, in both Position Statement 16-01 and this proposed position statement, that only home rule municipalities that adopt specific, enumerated provisions in their ethics codes are exempt. While the court of appeals overturned that 2019 opinion, it did so solely on the basis of a jurisdictional issue, not on the merits of the constitutional analysis.

In a related and ongoing case, the court of appeals ruled that the city of Glendale has adequately alleged it has a legally protected interest in its right to an exemption from IEC jurisdiction under Section 7 of Article XXIX. *City of Glendale v. Colorado Independent Ethics Commission*, 22CA0456 at ¶ 25 (Colo. App. June 1, 2023) (unpublished). In so ruling, the Court of appeals noted that it was not clear that the IEC even has the authority to determine whether a home rule entity is entitled to an exemption under Section 7 in the first place. *Id.* ¶¶ 23, 24. Indeed, when the carve-out applies, ethics complaints do not “arise under” Article XXIX such that the IEC lacks jurisdiction to hear them. This is contrary to the IEC’s proposed position granting itself the authority to determine if a home rule entity is entitled to an exemption based on the IEC’s interpretation and review of the entity’s ethics code.



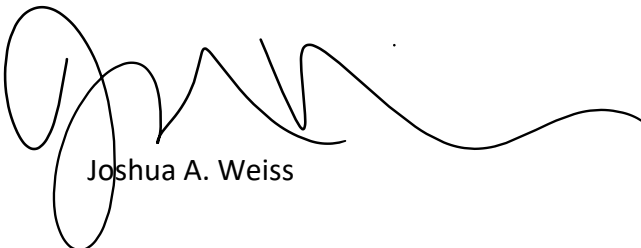
While the appellate order cited was limited to the question of standing, the dicta is persuasive, and the case has been remanded to the district court for a determination on the merits, which is expected to issue soon.

Though there has been little opportunity for judicial review of the IEC's position regarding the Section 7 carve-out, the authority that does exist supports the position that home rule municipalities are exempt from Article XXIX if they have undertaken to regulate the ethics of public officials in any way. Until and unless the courts determine that the IEC may impose additional requirements on home rule entities, it should not adopt a position statement to that effect.

### **Conclusion**

For the above reasons, I urge the IEC to reconsider its proposed position on the authority and application of Article XXIX to home rule municipalities that have adopted their own ethics codes. The IEC should instead adopt a position that is consistent with the plain language of the Constitution and the weight of legal authority: the carve-out in Section of Article XXIX applies to any home rule municipality or county that adopts a code of government ethics. Employees and officials from those home rule municipalities are not subject to IEC jurisdiction.

Sincerely,



Joshua A. Weiss