No.

IN THE

Supreme Court of the United States

DAVID EMICK, PETITIONER

v.

STATE OF COLORADO, MARK FERRANDINO, AND DEBORAH VAN WYKE

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO APPEALS COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

In Colorado, when a tax credit program designed to encourage conservation worked too well and caused an impact to tax revenues too great for the State to swall, the Legislature took measures *ex post facto* to claw-back their bargained for exchange with the taxpayers. In the real world this meant that farmers and ranchers who had sold the conservation easements in exchange for transferable tax credits which they had sold were left hold a tax bill and permanent conservation easement that they could not unwind. Colorado, acting thru its Department of Revenue, made sure of collecting these revenues by fraudulently claiming, as a means to force settlement or payment of the tax bills, that the value of those conservations bought by the State of Colorado were worth nothing despite appraisals to the contrary.

Thus, the question presented is: Did the Colorado Supreme Court err declining to review and rectify the decisions of the lower courts that ignored the very important equitable principle of constructive trust which provides for landowners to receive the due and owning just compensation for the property values that the State of Colorado took by accepting permanent conservation easements thru an *ex post facto* bait and switch scheme to fraudulently claw-back tax credits?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

- *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 2021CV256, District Court, Denver County for State of Colorado. Order Dismissing Action With Prejudice entered October 25, 2021.

- *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 21 CA 1969 Opinion Affirming District Court dismissal entered December 15, 2022 and Opinion denying petition of rehearing denied January 12, 2023.

- *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 2023SC96, Supreme Court of Colorado, Order Denying Certiorari entered September 5, 2023.

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When a State gets buyer's remorse on bargained for just compensation on private property purchased for the public benefit of conservation to take back that compensation but doesn't return the private property an inverse condemnation a taking occurs, that much is simple. But, when a state legislature passes an *ex post facto* law to effectuate the take back of the just compensation which is implemented by tax collectors through misrepresentation and threat, a constructive trust is created which requires the state of Colorado return the taken private property *or* the taken just compensation offered for the taken private property if the property cannot be returned. The Colorado General Assembly recognized the wrong and solution necessary to correct the wrong, but failed to make it right because of, again, budget concerns. This taking of the private property of thousands of Coloradans discredited important conservation efforts. Quite simply, the Fifth Amendment exists to stop the government from stealing property in the name of the public good and Colorado should have been made to pay for the property it permanently took from Coloradans like Mr. Emick.

The State District Court and the Court of Appeals refused to consider the evidence, that Colorado's actions to use misrepresented values in order to extort the claw-back amounts through negotiated payments or settlement agreements from the affected landowners created a constructive trust under Colorado law. And after the Colorado Supreme Court refused to review the matter, Coloradans are left to ask this Court, are the actions of Colorado acceptable under the Fifth Amendment?

OPINIONS BELOW

The Order of the Colorado Supreme Court denying the Petition for Certiorari without explanation in *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 2023SC96, dated September 5, 2023 is set forth in the appendix hereto page 1a.

The Order of the Colorado Court of Appeals denying the Petition for Rehearing without explanation in *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 21 CA 1969, entered January 12, 2023 is set forth in the appendix hereto page 2a-3a.

The Memorandum Opinion of the Colorado Court of Appeals affirming the District Court's dismissal in *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 21 CA 1969, entered December 15, 2022 is set forth in the appendix hereto pages 4a – 13a.

The state District Court Order Dismissing the Action with Prejudice in *David Emick v. State of Colorado, Mark Ferrandino, Deborah Van Wyck and Jane Does 1-4*, Case No. 2021CV256, dated October 25, 2021 is set forth in the appendix hereto pages 14a – 52a.

JURISDICTION

The Order of the Colorado Supreme Court denying the Petition for Certiorari was entered on September 5, 2023. This petition for writ of certiorari by Petitioners is filed within ninety (90) days from the date of the Order denying the Petition. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257.

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1257

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT

Right to Just Compensation for Private Property Taken for Public Use

Petitioner brought an action in Colorado state court on behalf of himself and others similarly situated to address the taking of their private property for conservation easements without just compensation by inverse condemnation means that equated to establishing a constructive trust. The Colorado state district court found that Mr. Emick lacked standing because of previous settlement that he had entered, but refused to consider that the methods used to elicit that settlement contract by the state of Colorado equitably established a constructive trust that enabled Mr. Emick to pursue a remedy for his stolen just compensation on behalf of himself and others that had suffered the same fate at the hands of Colorado's bureaucrats when he discovered evidence of their fraudulent conduct.

This lawsuit arises out of a bait-and-switch scheme carried out by the State of Colorado, the Colorado Department of Revenue ("DOR") thru at least Respondent Deborah Van Wyke, if not others employed by DOR, ("Colorado") and various identified and unidentified state officials against hundreds of Colorado landowners like Mr. Emick who were induced in good faith to participate in Colorado's conservation easement program. Many landowners participated

because the program presented the only viable way to preserve their farming and ranching activities during trying economic times. The fundamental idea behind the conservation easement program is that landowners will forever give up significant rights to use and develop their land and will convey valuable conservation easements to Colorado or to qualifying entities in exchange for tax credits. The State and its citizens benefit greatly from these conveyances because, in exchange for the tax credits, the State and the citizens of Colorado are able to maintain large tracts of land in pristine, open-space condition, in keeping with the character and long-standing traditions of Colorado. Habitats and historically significant land areas and structures are preserved. Additionally, the general public benefits from having scenic and educational access to Colorado's wilderness. Much of Colorado's tourism industry is dependent on the existence and preservation of large amounts of natural, open space.

Nevertheless, with respect to hundreds of grantors, Colorado sought to reap and to retain the benefits of tens of millions of dollars of conservation easements while bullying and scheming to deprive grantors of lawful tax credits – usually several years after the credits had been claimed and, in many cases, transferred to third parties pursuant to state law. Colorado's actions have devastated many hardworking farmers and ranchers, with many families losing their homes, lands, and livelihoods. Moreover, Colorado has undermined the equitable administration of the conservation easement program – a program that benefits all citizens of Colorado and is essential to the state in preserving its resources, habitats, open spaces, and general character and beauty.

As a result, the State, through the 2011 legislation and Defendants' overreaching application of the legislation and oversight under the program, improperly rejected many valid conservation easement tax credits, incorrectly holding them procedurally invalid and rejected valid appraisals claiming the value of the land is de minimis. Colorado, in turn, forced donors to engage in protracted and expensive procedures under the new legislation in order to protect their rights, many years after the date the donations were made, and the tax credits issued. The landowners were also required to engage in expensive litigation that was threatened to be protracted and even more expensive if landowners did not cave to the coercion of the state to accept settlement agreements to resolve the ex post facto claw back by the State. The retrospective application of the 2011 legislation, in addition to the conservation easement program, as implemented by the DOR, is not only arbitrary, unfair, and oppressive, but it has also harmed and will continue to harm landowners, and the Colorado public.

Colorado's actions violate landowner's rights to due process and equal protection under the State Constitutions. Moreover, Colorado's actions amount to the illegal, ex post facto application of laws and the impairment of third-party contracts, in violation of Article II, Section 11 of the Colorado Constitution. Because of the ongoing violations committed by Colorado with respect to the conservation easement program, and the unjust and onerous results of its administration of the program, Mr. Emick brought a lawsuit to seek redress for the illegal and arbitrary actions of Colorado, including their violations of Mr. Emick's and others similar situated statutory and state constitutional rights, and to protect the interests of the

many landowners who have faced the illegal, arbitrary actions of Respondents.

The Amended Complaint was filed January 22, 2021, in Prowers County, Colorado, and included class action allegations. Colorado moved the District Court for venue transfer, and on May 7, 2021, the Court granted the Motion to Transfer Venue to Denver District Court. Colorado filed a Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) on June 16, 2021. Mr. Emick's Response was filed August 13, 2021, simultaneously with an opposed Motion to Stay Proceedings due to the Colorado Legislature's bipartisan plans to mend the issue, making the proceedings before the Court no longer necessary, hoping to further promote judicial efficiency so that the Legislature might have justly resolved the issues before the Judiciary. The lower court denied Mr. Emick's Motion to Stay on October 25, 2021, and issued its order granting Respondents Motion to Dismiss that same day as well.

REASONS FOR GRANTING THE PETITION

In this Country there is no justification for letting state governments get buyer's remorse, then avoid paying owing just compensation by resorting to *ex post facto* legislations and egregious misrepresentations of the value of the private property taken for public benefit. Colorado law clearly supports the application of equity to this matter, yet no Court in Colorado had the gumption to apply the equity that the law and good conscience demands for these harmed landowners.

Central to and fatal to the lower courts' decisions are two harsh realities that Colorado Respondents

attempted to avoid at all costs. The first is a substantial problem for the Attorney General's Office given that as they defend the parties to this action, they were also the attorneys that prosecuted the tax collections that, upon information and belief, were undertaken in a fraudulent fashion with advice and consent of the Attorney General's Office. That is to say, as it was clearly pled, that the Department of Revenue acted contrary to clear direction of the "2011 law" that valid appraisals should form the basis for resolving the disputed tax credits, choosing instead to falsely claim amounting to the conservation easements being worth zero or de minimis amounts to extort higher settlements. It is only by ignoring this unlawful, fraudulent conduct by the Colorado government that the lower courts could arrived at the conclusion that the settlements (which the Attorney General's Office actively participated in pursuing) should not be set aside.

Next, likely to continue the effort to conceal their own participation in wrongdoing, the Attorney General's Office convinced the lower courts to sidestep the admission by the General Assembly that the actions of the State of Colorado were wrong. Mr. Emick raised this admission of wrongdoing by Colorado by the General Assembly requesting of Colorado that this matter be stayed in order to give the Legislature the opportunity to continue its efforts of the last several sessions (one of which was abridged by COVID) to remedy this wrong committed by the agencies of the State of Colorado, only to be rebutted by those same agencies. Specifically, the General Assembly states in Senate Bill 21-033:

(1) THE GENERAL ASSEMBLY *HEREBY FINDS AND DECLARES* THAT:

(a) IT IS THE INTENT OF THE GENERAL ASSEMBLY TO PROVIDE RELIEF THAT WILL **REPAIR THE HARM CAUSED BY THE DEPARTMENT OF REVENUE'S DISALLOWANCE OF COLORADO CONSERVATION EASEMENT TAX CREDITS TO LANDOWNERS** WHO IN GOOD FAITH, SUBJECT TO SUBSECTION (5) OF THIS SECTION, CONVEYED CONSERVATION EASEMENTS TO QUALIFIED CONSERVATION EASEMENT HOLDERS BETWEEN JANUARY 1, 2000, AND DECEMBER 31, 2013;

(b) STATE REPRESENTATIVE KIMMI LEWIS FROM HOUSE DISTRICT 64, WHO PASSED AWAY IN DECEMBER 2019, WORKED TIRELESSLY DURING HER CAREER AS A LEGISLATOR TO PROVIDE HELP TO **LANDOWNERS WHO HAD CONSERVATION EASEMENT CREDITS ARBITRARILY DISALLOWED**; AND

(c) THE AMOUNT OF ANY CREDIT ALLOWED PURSUANT TO THIS SECTION SHALL BE DECREASED

> BY ANY AMOUNT OF CREDIT THAT WAS OTHERWISE ALLOWED TO BE CLAIMED AGAINST THE TAXES IMPOSED BY THIS ARTICLE 22 OR OTHERWISE REINSTATED, AND BY ANY AMOUNT THAT WAS REIMBURSED OR OTHERWISE ALLOWED TO THE TRANSFEREE **AS A RESULT OF A *SETTLEMENT*, LITIGATION, OR OTHER MEANS THAT PROVIDED COMPENSATION TO THE TRANSFEREE**

In SB 21-033, which enjoyed bi-partisan sponsorship as well as strong bi-partisan support of the General Assembly, the legislature acknowledged not just the harm that the Department of Revenue caused, but also the truth that even those that had previously settled their tax disputes were owed a remedy by the State of Colorado. SB 21-033, after passing the Senate 33 to 2, only failed at the eleventh hour due to an impasse on funding the administrative cost in the bill's final house committee hearing in House Appropriations. This bill of course, as part of the General Assembly's acknowledgment, also provided for relief to the putative Petitioner here explicitly acknowledging that even if the tax liability was settled that the landowner was still owed a remedy by the State of Colorado. It should have been clear for the District Court that taking the allegations of the pleading as true, as the lower courts should have, that the actions of the Department of Revenue created a constructive trust that must be resolved with relation to conservation easements of Mr. Emick and the other putative class member landowners in Colorado. This same

constructive trust is acknowledged by the General Assembly and that body was close to resolving it for the benefit of Coloradans including Mr. Emick and the similarly situated putative class members. It cannot be that the legislative body acknowledging the wrongdoing by the State can be ignored so explicitly as was needed to deny the motion to stay or to allow the case to proceed as equitably tolled.

It is conceivable that a muddling of terms contributed to the lower courts' error in this matter. Settlement agreements are, after all, contracts and often times, contracts for the exchange of property not just resolution of claims. Thus, the state of Colorado's continued insistence that use of the term "donate" means that they could not have taken these private property conservation easements is misleading. Yes, for conservation and tax purposes, the conservation easements are donated, but the reality is that that state of Colorado offered consideration in the form of tax credits to landowners to incentivize the donation to the conservation public benefit of Colorado as a whole. Then Colorado reneged on the bargained for exchange clawing back the exchanged consideration while retaining the public benefits of conservation. This is a taking. Therefore, though somewhat novel, the idea that wrongfully clawing back tax credits previously conveyed to the landowners as the just compensation for the donation of conservation easements for the public good creates a constructive trust which enjoys a sound basis in the jurisprudence of Colorado. "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

Page v. Clark, 592 P.2d 792, 798 (Colo. 1979), *citing Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919). Moreover, analogizing this principle to the instant circumstances, "[a] constructive trust is a creature of equity and springs from a desire to prevent the statute of frauds from being used as a shield which would allow a party to be unjustly enriched," whereas here a constructive trust is a creature of equity that springs from a constitutional basis to prevent the state of Colorado from being unjustly enriched by clawing back the owing full just compensation exchanged for now permanent conservation easements. *Page* at 797, *citing Bohm v. Bohm*, 9 Colo. 100, 10 P. 790 (1886).

Again, the Colorado Supreme Court's instruction in *Page* should have been helpful for the instant case. Here, the state of Colorado obtained the personal property money (previously the just compensation tax credits exchanged for conservation easements) of landowners including Mr. Emick by a fraud in the form of the illegal refusal to use appropriate appraisals in the resolution of disallowed tax credits initiated *ex post* facto by the General Assembly and enforced in the settlement of the previous litigation to create a constructive trust of that personal property now requiring disgorgement of the wrongfully acquired property. And additionally, it was argued to the lower court that the plausible and sufficient allegations of the complaint, taken as true, that the duress (despite the reliance of Colorado of the language contained in the settlement agreements to the contrary) of potentially long expensive legal battles and the threat of expensive penalties requires the imposition of a constructive trust requiring the property be returned to the transferor in this case, the landowners. *Page v. Clark*, 592 P.2d 792,

798 (Colo. 1979). But even more importantly from *Page* and overlooked by Colorado looking to avoid liability for wrongful acts is the confidential relationship between the citizen landowners and their government. Again, the Colorado Supreme Court in *Page* held that "when one party holds a position of superiority over another, or when two parties have a "confidential relationship," a transfer of property [] obtained as a result of an abuse of those relationships may be set aside." *Id. citing United Fire v. Nissan Motor*, 164 Colo. 42, 433 P.2d 769 (1967); *Bohm v. Bohm, supra*. Here, it is hard to imagine a greater disparity in superiority than between the might of the state of Colorado focused through its tax collectors against the tax paying citizens and the clear abuse of that power evidenced by the Respondent Van Wyke email admitting to the misrepresentations used to elicit the settlements. This evidence should have persuaded the Colorado Courts to set aside that transfer to return the owing just compensation to the landowners rather than a dismissal of this important case on perfunctory grounds.

Thus, the decision of the District Court regarding lack of standing by Mr. Emick and other class members who previously entered settlements and the arguments for claim preclusion was in error under either C.R.C.P. 12 (b)(1) or 12(b)(5). Taking the allegations as it must at the Rule 12 stage, the District Court could not have ignored the allegations that Petitioner was not aware and should not reasonably have been aware that State of Colorado was acting unlawfully in a fashion that created a constructive trust before the Van Wyck email was discovered. "The court of appeals held that the period of limitations did not commence until the claimant under the constructive trust acquired, or should have acquired, knowledge of

the trust. We affirm the court of appeals and remand for further proceedings." *Lucas v. Abbott*, 601 P.2d 1376, 1378 (Colo. 1979).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP

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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Court of Appeals, 2021CA1969 District Court, Denver County, 2021CV256	
Petitioner: David Emick, **v.** **Respondents:** State of Colorado, Mark Ferrandino, and Deborah Van Wyke.	Supreme Court Case No: 2023SC96
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 5, 2023.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Denver District Court 2021CV256	
Plaintiff-Appellant: David Emick, **v.** **Defendants-Appellees:** State of Colorado, Mark Ferrandino, and Deborah Van Wyke.	Colorado Court of Appeals Number: 2021CA1696
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:

David K. Emick, Plaintiff-Appellant,

is **DENIED**.

Issuance of the Mandate is stayed until: February 10, 2023

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: January 12, 2023

BY THE COURT:
Tow, J.
Grove, J.
Schutz, J.

21CA1969 Emick v State 12-15-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA1969
City and County of Denver District Court No. 21CV256
Honorable A. Bruce Jones, Judge

David K. Emick,

Plaintiff-Appellant,

v.

State of Colorado, Mark Ferrandino, and Deborah Van Wyke,

Defendants-Appellees.

ORDER AFFIRMED

Division B
Opinion by JUDGE GROVE
Tow and Schutz, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 15, 2022

A. Blair Dunn, Albuquerque, New Mexico, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Noah Patterson,

Assistant Solicitor General, Anne Mangiardi, Assistant Solicitor General, Emma Garrison, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

1 Plaintiff, David K. Emick, appeals the district court's order dismissing his complaint pursuant to C.R.C.P. 12(b)(1) and 12(b)(5), as well as the court's order denying his motion to stay the proceedings pending legislative action that he contends could resolve the issues he raised in his complaint. Because we conclude that the causes of action Emick asserted are barred by the statute of limitations, we affirm.

I. Background

2 In 2005, Emick donated an easement to the state pursuant to the state's conservation easement program. Generally speaking, the program allows a landowner, in exchange for tax credits, to forgo the right to develop property in order to further the conservation efforts of the state. § 39-22-522, C.R.S. 2022. Tax credits acquired under the program may be sold to third parties. § 39-22-522(7).

3 In 2009, the Department of Revenue (DOR) disallowed Emick's claimed tax credits and sent a deficiency notice stating that he owed back taxes as a result of the disallowance. Two years later, Emick, along with several other parties who had participated in the conservation easement program in Prowers County, appealed DOR's decision to the district court pursuant to section 39-22-522.5(2)(a), C.R.S. 2022. In 2013, the parties settled the appeal and stipulated to the dismissal of the case. Under the settlement agreement, Emick released DOR

> from any and all claims or causes of action that [he has] now or may have in the future, whether known or unknown, arising out of the disallowance of the [conservation easement] Tax Credits by [DOR], the issuance of the Notices related thereto, the [conservation easements], or the [2011] Case, except for any breach of this Agreement.

4 In 2016, an organization to which Emick belonged, the Landowners United Advocacy Foundation, Inc., sued DOR and several other state agencies in federal court. Emick submitted an affidavit in support of the lawsuit, which alleged a number of shortcomings in DOR's administration of the conservation easement program. Specifically, the complaint alleged that DOR had violated its members' equal protection and due process rights, that DOR had violated state constitutional protections against ex post facto laws and the impairment of third-party contracts, and that by disallowing conservation easements, DOR had effected an unlawful taking of property. Concluding that the plaintiff's claims were barred by the Tax Injunction Act, the federal district court dismissed that lawsuit in 2019, and the Tenth Circuit Court of Appeals later affirmed the district court's ruling. *See Landowners United Advoc. Found., Inc. v. Cordova*, 822 F. App'x 797 (10th Cir. 2020).

5 After the federal lawsuit was dismissed, Emick filed the lawsuit underlying this appeal, with himself as the plaintiff, in Prowers County. Naming as defendants the State of Colorado, tax conferee Deborah Van Wyke, and "Jane Does 1-4," and requesting class certification on behalf of taxpayers who "put their property into the

Colorado Conservation Program induced by fraud," the lawsuit asserted claims echoing those advanced in the unsuccessful federal lawsuit. As subsequently amended, the complaint asserted that the defendants' administration of the conservation easement program

- effected an unconstitutional taking pursuant to Colorado Constitution article II, section 15;
- violated class members' equal protection rights under Colorado Constitution article II, section 25, and impaired contracts between donors and third parties contrary to Colorado Constitution article II, section 11;
- violated class members' rights to due process guaranteed by Colorado Constitution article II, section 25;
- applied an ex post facto law contrary to Colorado Constitution article II, section 11; and
- amounted to malicious prosecution because DOR "misused law to knowingly take property by valuing conservation easements at zero... and engaged in tax administrative prosecutions under threat of fines and jailing in order to extort settlements from [Emick] and others similarly situated."

6 Additionally, Emick argued and continues to argue that the 2013 settlement of his original appeal (filed in 2011) was a product of threats, coercion, and fraud. In support of this claim, Emick identified a 2019 email from tax conferee Van Wyke, which explained DOR's approach to settling tax liabilities, as evidence of fraud and arbitrary governmental action.

7 After transferring venue from Prowers County to Denver District Court, the defendants filed a motion to dismiss Emick's complaint pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). The defendants asserted that the case was an "attempt to re-litigate the conservation easement... tax credit case [that Emick] previously brought against [DOR] in 2011." Among other things, they argued that (1) Emick lacked standing "because he signed a settlement agreement releasing DOR from all claims related to his [conservation easement] tax credits," (2) Emick's tort claims were barred by the Colorado Governmental Immunity Act, and (3) Emick's claims were barred by claim preclusion and the statute of limitations.

8 Emick withdrew his claims for malicious prosecution and equal protection and then requested a stay of the proceedings, asserting that legislation proposed in the General Assembly would, if passed, provide the relief that he sought.[1] However, concluding that Emick lacked standing, the district court granted the defendants' motion to dismiss and thus denied the motion to stay.

II. Analysis

9 Emick appeals both orders. Because we conclude that all of his claims are barred by the statute of limitations, we affirm. *See Morley v. United Servs. Auto. Ass'n*, 2019 COA 169, ¶ 37 (court of appeals may

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[1] The proposed legislation, Senate Bill 21-033, was not adopted during the 2021 legislative session. Similar legislation was proposed in 2022 (Senate Bill 22-119) but was indefinitely postponed and thus did not pass.

affirm district court order on any grounds supported by the record).

A. Standard of Review

10 We review de novo the dismissal of a plaintiff's complaint under C.R.C.P. 12(b)(1) or 12(b)(5). *Sch. Dist. No. 1 v. Masters*, 2018 CO 18, ¶ 13. When the facts related to when an injury arose and would have been known are not in dispute, we may also determine de novo whether the statute of limitations applies. *Williams v. Crop Prod. Servs., Inc.*, 2015 COA 64, ¶ 4.

B. Statute of Limitations

11 Section 13-80-102(1)(h), C.R.S. 2022, bars actions against public entities and their employees brought more than two years after the action accrued. *Bad Boys of Cripple Creek Mining Co. v. City of Cripple Creek*, 996 P.2d 792, 795 (Colo. App. 2000) (addressing a takings claim and finding the statute applies to all actions against public entities, regardless of the theory of the suit). An action accrues when the plaintiff discovered or reasonably should have discovered the harm and conduct giving rise to the cause of action. § 13-80-108(8), C.R.S. 2022.

12 The record before us demonstrates that Emick was on notice of the claims he asserted in his complaint more than two years before October 23, 2020, when he filed it in Prowers County. Indeed, as we have already noted, the claims in the federal lawsuit filed in 2016 by the Landowners United Advocacy Foundation were

virtually identical to those asserted in this case.[2] And while Emick was not personally a party to that lawsuit, he was a member of the plaintiff organization and filed an affidavit in support of the complaint. As a result, we conclude that Emick's claims accrued no later than March 2016 — more than four years before he filed suit in this case. Consequently, unless an exception applies, all of Emick's claims are barred as untimely under section 13-80- 102(1)(h).

13 There are numerous exceptions to the statute of limitations; Emick argues that two apply.

14 First, Emick contends that an email from Deborah Van Wyke that was attached to his complaint demonstrates that DOR engaged in a fraudulent scheme to deprive landowners of tax credits. We understand this to be an argument that the defendants should be equitably estopped from raising a statute of limitations defense. *See Shell W. E & P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1007 (Colo. 1997) (holding that equitable estoppel prevents a defendant from asserting a time bar when the defendant's actions contribute to the plaintiff missing the deadline).

15 The email in question explained that when negotiating suits over tax liability and tax credits, DOR

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[2] The defendants argue that Emick's claims accrued no later than 2009, when he received notice that his tax credit had been disallowed. Due to the similarities between Emick's complaint in this case and the claims asserted in the 2016 federal lawsuit filed by the Landowners United Advocacy Foundation, it is unnecessary for us to look back further than 2016 in order to apply the statute of limitations.

> do[es] NOT assert [sic] any value to the [conservation easement] when trying to resolve the protests of disallowed tax credit cases. Instead, we try to remain consistent with how each case is settled compared with other cases. Our settlement figures are not a valuation of the [conservation easement] but instead are an offer to resolve the outstanding tax liability (since the tax credit used to offset the liability was disallowed).

16 Based on this email, Emick argues that the 2013 settlement and resulting tax liabilities were a product of fraud or at least arbitrary governmental action, which he did not discover until the email was received.

17 Even if we were to assume that the email is evidence of malfeasance, we would still conclude that equitable estoppel does not apply because Emick cannot satisfy the causal element. Equitable estoppel is only applicable when the defendant's wrongful action *causes* the plaintiff to miss the filing deadline. *See id.* The 2016 federal lawsuit was filed three years before this email was sent. Because the federal suit predates Van Wyke's email, and because the claims that Emick asserted in this case are essentially the same as those that were asserted in federal court, we cannot conclude that DOR's failure to reveal the information in the email more promptly prevented Emick from timely filing his claims.

18 Second, Emick argues that the instant lawsuit was timely because he filed it within ninety days of the involuntary dismissal of the federal lawsuit. *See* § 13-80-111, C.R.S. 2022 (allowing a plaintiff to "commence a

new action upon the same cause of action within ninety days after the termination of the original action" if the original action is dismissed for lack of jurisdiction or improper venue); *see also W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77. But by its plain terms, Colorado's remedial revival statute provides an exception to the statute of limitations only where the same plaintiff files both lawsuits. § 13-80-111(1) ("If an action is commenced within the period allowed by this article and is terminated because of lack of jurisdiction or improper venue, *the plaintiff*... may commence a new action upon the same cause of action...."); *cf. Grenillo v. Hansen*, 2020 COA 82, ¶ 11 ("The plain language of the statute does not allow a plaintiff to bring her revived action against a new defendant — in this case, the estate of the decedent — that was not a party to the original action."). Because Emick was not a party to the federal lawsuit filed by Landowners United Advocacy Foundation, the remedial revival statute does not apply, and his lawsuit is barred by the statute of limitations.

III. Denial of Stay

19 It follows from our determination that Emick's complaint was properly dismissed that the district court did not abuse its discretion in denying Emick's motion for a stay. *See Wallin v. McCabe*, 293 P.3d 81, 85 (Colo. App. 2011) ("The decision whether to stay or continue proceedings resides in the sound discretion of the trial court."). Simply put, there was no reason for the court to stay the case while awaiting legislative action when Emick would not be entitled to relief on his claims in any event.

IV. Conclusion

20 We affirm the district court's order dismissing Emick's complaint and the order denying Emick's motion to stay the proceedings.

JUDGE TOW and JUDGE SCHUTZ concur.

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	
Plaintiff(s) DAVID EMICK v. **Defendant(s)** STATE OF COLORADO et al.	△ **COURT USE ONLY** △ Case Number: 2021CV256 Division: 275 Courtroom:
Order: Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) w/ attach	

The motion/proposed order attached hereto: GRANTED.

Having previously settled the dispute upon which his current claims are based, Plaintiff lacks standing to bring this action. Further, his attempts to avoid that settlement are not plausibly alleged as required by *Warne v. Hall.* In fact, the Amended Complaint does not specifically refer to the settlement, its terms, the participants, or how it was negotiated. Instead, in a conclusory fashion, Plaintiff alleges the settlement was the result of extortion and threats. There are no facts alleged in support of these conclusions. The Amended Complaint therefore fails to state a claim to set aside the settlement, which contains broad release language

that otherwise precludes Plaintiff from once more pursuing relief.

In light of the foregoing, the Court need not and will not address the remaining arguments in the motion. The motion to dismiss is granted.

Issue Date: 10/25/2021

A BRUCE JONES
District Court Judge

DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Denver, CO, 80202	
DAVID EMICK Plaintiff, v. STATE OF COLORADO, MARK FERRANDINO, DEBORAH VAN WYKE, and JANE DOES 1-4, Defendants.	△ COURT USE ONLY △
PHILIP J. WEISER, Attorney General NOAH PATTERSON, Senior Assistant Attorney General, Reg. No. 42339* ANNE MANGIARDI, Assistant Attorney General, Reg. No. 44284* EMMA GARRISON, Assistant Attorney General, Reg. No. 42110*	Case Number: 2021CV256 Division: 275 Courtroom:

Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8th Floor Denver, CO 80203 Telephone: 720-508-6361 (Patterson); x6359 (Mangiardi); x6352 (Garrison) E-Mail: noah.patterson@coag.gov; anne.mangiardi@coag.gov; emma.garrison@coag.gov *Counsel of Record for Defendants	
Order: Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) w/ attach	

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CERTIFICATE OF CONFERRAL

Defendants' counsel conferred with opposing counsel pursuant to C.R.C.P. 121 § 1-15(8) regarding this Motion. Plaintiff opposes this motion.

INTRODUCTION

This case is Plaintiff's attempt to re-litigate the conservation easement ("CE") tax credit case he previously brought against the Colorado Department of Revenue ("DOR") in 2011. That State district court case challenged the disallowance of Plaintiff's CE tax credit claim. Plaintiff settled with DOR and dismissed all claims against DOR and its officials/employees in 2013. This Court should not entertain Plaintiff's attempt to relitigate his 2011 case. The Amended Complaint ("AC") should be dismissed for the following reasons:

1. Plaintiff does not have standing because he signed a settlement agreement releasing DOR from all claims related to his CE tax credits.

2. The Colorado Governmental Immunity Act ("CGIA") bars Plaintiff's malicious prosecution claim because it is a tort claim and the General Assembly has not waived the State's immunity.

3. None of Plaintiff's claims state a claim upon which relief can be granted. Further, claim preclusion bars Plaintiff's claims and all of Plaintiff's constitutional claims are also barred by the statute of limitations. Finally, Plaintiff's attempt to seek damages by overturning his settlement agreement and agreements signed by others in a putative class is barred by Colorado Supreme Court precedent.

STATUTORY BACKGROUND

I. Colorado's CE tax credit has strict state and federal requirements.

Colorado statute allows a State income tax credit for a CE donation to a governmental entity *or* charitable organization. § 39-22-522(2), C.R.S. CE tax credits provide a dollar-for-dollar reduction in taxes owed, § 39-22-522(2), C.R.S., with a current cap of $5 million per donation. § 39-22-522(4)(a)(II.5), C.R.S. To qualify for a tax credit, the donation must satisfy a series of state and federal laws and regulations. *See* § 39-22-522, C.R.S. ("Section 522"); 26 U.S.C. § 170; 1 C.C.R. 201-2:39-22-522; 26 C.F.R. §§ 1.170A-13 & -14. Taxpayers may apply these credits against their own tax liabilities or sell them to third-party credit buyers for use on the buyers' own tax returns. § 39-22-522(7), C.R.S.

II. Colorado's CE tax credit program has been administered pursuant to a detailed statutory system.

For CE donations made prior to January 1, 2014, only DOR could approve or reject CE tax credit claims. § 39-22-522(3.5)(a)(I), C.R.S. For these pre-2014 donations, there was no pre-approval process for claimed CE tax credits. Instead, DOR would review the credit claim *after* the tax return was filed and then decide whether Colorado law required it to accept or reject the credit claim. § 39-22- 522(3.5)(a)(I), C.R.S. In this process, the taxpayer had the burden of proving the CE's value. *See id*; *see also Schumacher v. U.S.*, 931

F.2d 650, 652 (10th Cir. 1991) (explaining "tax credits are a matter of legislative grace, and taxpayers bear the burden of clearly showing that they are entitled to them").

Beginning January 1, 2014, the General Assembly enacted a pre-approval process. *See* §§ 12-61-727, 39-22-522(3.6), C.R.S. (2014). Under this pre-approval process, taxpayers apply for a CE tax credit certificate before claiming a CE tax credit on their income tax return. § 39-22-522(3.6), C.R.S. The Amended Complaint solely alleges facts related to the *pre-2014* process. Thus, this motion focuses on the pre-2014 statutory scheme.

III. The General Assembly provided taxpayers with disputed CE tax credits a statutory procedure to obtain relief.

When a taxpayer claimed a tax credit on their Colorado income tax return for a CE donated prior to 2014, DOR reviewed the return and attachments to determine whether the credit was valid and properly valued. § 39-22-522(3.5)(a)(I), C.R.S. A taxpayer whose credit was disallowed after this review was issued a notice of deficiency, if applicable, requiring payment of taxes due as well as penalties and interest. § 39-21-103(1), C.R.S.

When a CE tax credit is disallowed, as with any disputed tax return, the taxpayer can appeal the disallowance and receive an administrative hearing. §§ 39- 22-522(3.5)(a)(I), 39-21-103(4), C.R.S. Taxpayers can further appeal a negative administrative ruling to state district court for a de novo review. § 39-21-105, C.R.S. The district court's ruling is appealable to the Colorado Court of Appeals and Colorado Supreme Court. § 39-21-

105(8)(a), C.R.S.

Section 39-22-522.5 ("Section 522.5")[1] was enacted in 2011 to expedite CE tax credit cases in DOR's administrative process. § 39-22-522.5(1)(d), (e), (f), C.R.S. Section 522.5 allowed certain CE tax credit claimants to waive the statutory administrative hearing process and appeal directly to district court. § 39-22-522.5(1)(h), (2), C.R.S. CE tax credit actions consist of a preliminary validity stage and three subsequent, discrete "phases." § 39-22-522.5(2), C.R.S. This "Phased Approach" applied prospectively to lawsuits of CE tax credits that had already been disallowed. *Id.* DOR also adopted this approach for its CE tax credit administrative hearings. 1 C.C.R. 201-2:39-22-522(11).

CE tax credit claimants with disputed credits who chose not to waive the administrative process could instead request an expedited administrative hearing or take no action and wait for their administrative hearing to be scheduled. § 39-22-522.5(3), (4), C.R.S. The vast majority of CE tax credit disputes involving DOR were resolved by 2017. DOR Legislative Report (June 30, 2017) (*Ex. A*), pp.1, 4 (available at https://tinyurl.com/h889px4).[2]

PRIOR LITIGATION AND RESOLUTION OF CE TAX CREDIT CLAIMS

The 2011 Case. Plaintiff donated a CE in 2005 and claimed CE tax credits. *David Emick, et al. v.*

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[1] Section 522.5 is the "2011 law" Plaintiff refers to throughout the Amended Complaint (e.g., ¶¶12–13, 48, 53–56, 83–85).

[2] As discussed in the Standards of Review section below, facts which are a matter of public record may be considered by this Court under either C.R.C.P. 12(b)(1) or 12(b)(5) without converting this motion to a motion for summary judgment.

Barbara Brohl, Executive Director, Colo. Dep't of Revenue, Notice of Appeal (*Ex. B*), p.2, Prowers County District Court Case No. 2011CV101. DOR mailed him a Notice of Disallowance on April 29, 2009. *Id.* at 3. Plaintiff sent a letter protesting the disallowance of his tax credit claim to DOR on May 25, 2009. *Id.*

On September 30, 2011, Plaintiff (along with related parties) filed a lawsuit in Prowers County District Court challenging DOR's disallowance of his 2005 CE tax credit claim. *Ex. B.* Following substantial litigation and discovery, the plaintiffs and DOR filed a stipulation on August 7, 2013. That stipulation explained that the "parties to this action have agreed to resolve this dispute as to all matters involving the [CE tax credits] at issue in this case." *Ex. C.*[3] The plaintiffs, including the Plaintiff here, stipulated that they owed the taxes identified in an exhibit to that stipulation. *Id.* at 3. The Court approved the stipulation on August 9, 2013. Prowers County District Court Case No. 2011CV101. And on October 11, 2013, the Court dismissed all claims against DOR and its employees with prejudice, following a *joint* motion to dismiss filed by DOR and the plaintiffs (including Plaintiff here). *Ex. D.*

The Settlement Agreement. In September 2013, Plaintiff signed a settlement agreement with DOR. *Ex. E.*[4] Plaintiff released DOR "from any and all claims or causes of action that [he has] now or may have in the future, whether known or unknown, arising out of the

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[3] While the stipulation itself is attached as Exhibit C, its Exhibits are not attached here. They can be found in Prowers County District Court Case No. 2011CV101.

[4] This exhibit is filed with an accompanying motion to limit access.

disallowance of the CE Tax Credits by [DOR], the issuance of the Notices related thereto, the CEs, or the [2011] Case, except for any breach of this Agreement." *Id.* at 7 (p.6 of the agreement). Plaintiff does not allege any breach of the settlement agreement. Plaintiff agreed that he executed the agreement "freely, without coercion or under duress." *Id.* at 8–9 (pp.7–8 of the agreement).

The Landowners United Case. On March 14, 2016, Landowners United Advocacy Foundation, Inc. filed a federal lawsuit against the State of Colorado, DOR's executive director, and other state officials. The claims in that lawsuit were nearly identical to those raised in this case. *Ex. F.* Plaintiff here (Mr. Emick) was a member of Landowners United. *Ex. G* (affidavit filed in *Landowners United*). The Landowners United case was dismissed on grounds not applicable here. *See Landowners United v. Hartman*, Civil Action No. 16-cv-00603, 2019 WL 1125866 (D. Colo. Mar. 12, 2019). The 10th Circuit Court of Appeals affirmed that dismissal in an unpublished opinion. *Landowners United v. Cordova*, 822 Fed. Appx. 797 (10th Cir. 2020).

STANDARDS OF REVIEW

Defendants seek dismissal of this case under C.R.C.P. 12(b)(1) and (b)(5). First, "[a] trial court may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion." *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009). Plaintiff bears the burden of proving jurisdiction. *Boulder v. Pub. Serv. Co.*, 420 P.3d 289, 293 (Colo. 2018).

Second, under C.R.C.P. 12(b)(5), "a complaint

must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting *Iqbal* and *Twombly*'s plausibility standard). To be accepted as true for purposes of a motion to dismiss, factual allegations must not be "conclusory statements" or "bare assertions." *Iqbal*, 556 U.S. at 678–81; *see also Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995) (To survive a motion to dismiss, plaintiff "must do more than make mere conclusory statements regarding the constitutional claims."). Similarly, legal conclusions are not accepted as true. *Iqbal*, 556 U.S. at 678. If a complaint contains well-pleaded factual allegations, the court must "then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

In addition to considering the allegations in the complaint, a Court ruling on a motion to dismiss under C.R.C.P. 12(b)(5) may also consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007).[5] A court is "permitted to take judicial notice of its own files and records, as well as facts which are a matter of public record." *Van Woudenberg v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001) *see also Peña v. Am. Family Mut. Ins. Co.*, 463 P.3d 879, 881–82

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[5] Colorado courts "look to federal authorities for guidance in construing" C.R.C.P. 12(b)(1) and 12(b)(5). *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993).

(Colo. App. 2018) (permitting courts to take judicial notice of "public records," even when resolving a C.R.C.P. 12(b)(5) motion to dismiss).

ARGUMENT

I. The Complaint must be dismissed under C.R.C.P. 12(b)(1).

A. Plaintiff does not have standing because he has already settled "all claims" related to the CE tax credits.

To establish standing, "the plaintiff must have suffered an injury in fact, and second, that injury must be to a legally protected interest as contemplated by statutory or constitutional provisions." *LaPlata Cty. v. Colo. Oil & Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003). Standing is a "jurisdictional prerequisite." *People v. Shank*, 420 P.3d 240, 243 (Colo. 2018). If the plaintiff lacks standing, "the court must dismiss the case." *Id.* In a putative class action lawsuit, the *named plaintiff* must have standing for the action to proceed. *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009).

Plaintiff has not suffered an injury in fact to a legally protected interest. Plaintiff's only possible injury occurred in 2009 when DOR disallowed his tax credit claim. That injury was resolved in 2013 when Plaintiff and DOR reached a settlement agreement allowing part of Plaintiff's claimed tax credits (and disallowing the remainder). *Ex. E.* While Plaintiff now contends that CE tax credit settlements were "extort[ed] … under the threat of fines or jailing for non-payment of taxes, and/or requiring great legal

expense from the Plaintiffs to defend against the fraudulent demands for repayment of taxes," *AC*, ¶58, even that claim is resolved by the 2013 settlement agreement. Plaintiff released DOR "from any and all claims or causes of action that [he has] now or may have in the future, whether known or unknown, arising out of the disallowance of the CE Tax Credits by [DOR], the issuance of the Notices related thereto, the CEs, or the [2011] Case, except for any breach of this Agreement." *Ex. E*. That broad release covers every claim in the Amended Complaint. Further, directly speaking to Plaintiff's assertion that DOR "extort[ed]" settlements, Plaintiff agreed in 2013 that he executed the agreement "freely, without coercion or under duress." *Ex. E*.

A plaintiff that has settled claims has no standing to bring another lawsuit asserting claims already released. *See, e.g.*, *Arline v. Am. Family Mut. Ins. Co.*, 431 P.3d 670, 672–74 (Colo. App. 2018) (affirming district court's dismissal for lack of standing because of settlement agreement releasing claims). As the U.S. Supreme Court has held, there is "no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

Courts do not have jurisdiction to decide cases—"even by way of declaration"— without "a showing that a judgment, if entered, would afford the plaintiff present relief." *Farmer's Ins. v. Dist. Ct.*, 862 P.2d 944, 947 (Colo. 1993) (quotation marks omitted). Plaintiff already released DOR from the claims here, so this lawsuit would not afford him relief. He lacks standing

and the case must be dismissed.

B. Plaintiff's malicious prosecution claim is barred by the CGIA.

Under the CGIA, public employees and entities are immune from all claims that "lie in tort or could lie in tort," except when the General Assembly has waived immunity to a specific type of claim. §§ 24-10-106(1) & -118(2)(a), C.R.S. All Defendants are covered by the CGIA because they are either the State itself or its employees. *AC*, ¶¶5–8; § 24-10-103(4)(a) & (5), C.R.S. Plaintiff's malicious prosecution claim "lies in tort" and is barred by the CGIA. *State v. Zahourek*, 935 P.2d 74, 77–78 (Colo. App. 1996) (CGIA bars malicious prosecution claims), *aff'd sub nom Graham v. State*, 956 P.2d 556 (Colo. 1998).[6]

The Amended Complaint does not allege a waiver of Defendants' sovereign immunity, and none of the waivers in section 24-10-106(1), C.R.S., apply to Plaintiff's or to any putative class member's tort claims. Nor does the Amended Complaint allege facts from

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[6] As a separate jurisdictional matter, Plaintiff's claims are also barred because he failed to satisfy the notice requirement in section 24-10-109, C.R.S. *See, e.g., E. Lakewood Sanitation Dist. v. Dist. Court*, 842 P.2d 233, 236 (Colo. 1992); *see also Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766, 769 (Colo. 2000) ("[A] claimant must allege in [their] complaint that the claimant has complied with the jurisdictional prerequisite of filing of a notice of claim."). While Plaintiff sent a notice dated December 28, 2010, that notice did not give notice of any claims asserted in the Amended Complaint. *Ex. H*. Further, it did not give notice of any claims against Deborah Van Wyke or "Jane Doe" Defendants. *Id.* Finally, a notice from 2010 cannot give notice of claims filed in 2020; any claims for which it provided notice were barred by the applicable statute of limitations long ago. § 13-80-102(1)(a), C.R.S.

which a waiver of immunity can be inferred. The malicious prosecution claim must be dismissed under the CGIA for lack of subject matter jurisdiction. *See Fogg v. Macaluso*, 892 P.2d 271, 276–77 (Colo. 1995) (explaining that sovereign immunity issues are decided under C.R.C.P. 12(b)(1)).

II. Each claim must be dismissed under C.R.C.P. 12(b)(5).

A. Claim preclusion bars relitigation of the claims here because Plaintiff released all these claims in the 2013 settlement.

Claim preclusion "preclude[s] the relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not." *Argus Real Est., Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). Where the first judgment was based on a settlement agreement, the scope of the preclusive effect is determined by the terms of the settlement agreement. *O'Neil v. Wolpoff & Abramson, L.L.P.*, 210 P.3d 482, 484 (Colo. App. 2009). The settlement agreement between Plaintiff and DOR released all claims "arising out of the disallowance of the CE Tax Credits by Revenue, the issuance of the Notices related thereto, the CEs, or the [2011] Case." *Ex. E*. Claim preclusion bars this litigation.[7]

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[7] The Court can find claim preclusion here based solely on documents that are judicially noticeable, including the dismissal order in the 2011 case (*Ex. D*) and the accompanying stipulation (*Ex. C*). The Court may also consider the settlement agreement because the Amended Complaint repeatedly references the settlement agreement (and asks this Court to "vacate" that

Claim preclusion requires four elements: "(1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions." *Argus*, 109 P.3d at 608. Three of the four elements require little discussion here. First, the settlement agreement resulted in the final dismissal of all claims against DOR in the 2011 case. *Ex. D.* Second, the same CE Plaintiff donated to claim a tax credit is the subject matter of both actions. *See Argus*, 109 P.3d at 608 (holding that identity of subject matter is established where both actions concern "the same parcel of land and same agreement" regarding that land).

Turning briefly to the last element, identity or privity between parties exists here. Plaintiff was also a plaintiff in the first action and signed the settlement agreement. *Exs.* C–E. The sole defendant in the 2011 case was DOR's Executive Director. *Ex. D.* The current lawsuit lists Mark Ferrandino as a defendant in his official capacity as the current Executive Director. *AC*, ¶7. And the 2013 order of dismissal shows the parties to the settlement agreement intended to release not only DOR itself, but also its "representatives, employees, or agents." *Ex. D.* Element four is met for all Defendants.

Turning finally to the third element, identity of claims for relief: the scope of the settlement in the 2011 case is broad and includes all claims here. Judicially noticeable documents show the scope includes "[a]ll claims against [DOR], and any representatives, employees, or agents of [DOR]." *Ex.* D. The settlement agreement is even clearer: Plaintiff released DOR

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agreement). *See AC*, pp.14, 16–18, 21; *Tellabs, Inc.*, 551 U.S. at 322–23.

"from any and all claims or causes of action that they have now or may have in the future, whether known or unknown, arising out of the disallowance of the CE Tax credits by [DOR], the issuance of the notices related thereto, the CEs, or the Case." *Ex. E*. The only exception to the release is "any breach of this Agreement." *Id.*[8]

Though Plaintiff's allegations here may be based on different legal theories than the 2011 lawsuit, all relate to "disallowance of the CE Tax credits by Revenue, the issuance of the notices related thereto, the CEs, or the Case." The focus of the third element is "the injury for which relief is demanded," not "the legal theory on which the person asserting the claim relies." *Foster v. Plock*, 411 P.3d 1008, 1015 (Colo. App. 2016) (quotation marks omitted), *aff'd on other grounds*, 394 P.3d 1119 (Colo. 2017) (holding claims based on the same contract were identical, despite differing legal theories); *see also Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 (10th Cir. 1999) ("[A] claim arising out of the same 'transaction, or series of connected transactions' as a previous suit, which concluded in a valid and final judgment, will be precluded.") (citation omitted). Moreover, the settlement agreement specifically extends to "all claims or causes of action that [David Emick has] now or may have in the future." *Ex. E*. Because the scope of the settlement agreement determines the preclusive effect of a judgment of dismissal based on that agreement, the prior dismissal bars all claims in the Amended Complaint.

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[8] Though the Amended Complaint asks the Court to vacate the settlement agreement, there is no allegation that DOR breached the agreement.

B. Plaintiff fails to state an equal protection claim.

To state an equal protection claim, Plaintiff must allege facts sufficient to establish that taxpayers have been treated differently from other "similarly situated" taxpayers. *Crider v. Cty. of Boulder*, 246 F.3d 1285, 1288 (10th Cir. 2001).[9] The Amended Complaint does not allege such facts. And even if it did, the Amended Complaint also fails to state an equal protection claim because it does not "allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Brown*, 63 F.3d at 971.

1. Plaintiff fails to allege facts regarding the "similarly situated" requirement.

The equal protection claim ("Count I") fails because the Amended Complaint does not allege any facts regarding the "threshold question" of whether Plaintiff and his putative class are treated differently from a "similarly situated" group. *Rocky Mountain Greyhound Park, Inc. v. Wembley, PLC*, 992 P.2d 711, 714 (Colo. App. 1999). Instead, the Amended Complaint makes vague references to "other taxpayers" and "wealthy" as compared to "non-wealthy" taxpayers.

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[9] While Plaintiff relies on the Colorado Constitution for his equal protection claim, *AC*, ¶60, the "substantive application" of the Colorado Constitution's equal protection guarantee "is the same" as application of the U.S. Constitution's equal protection clause. *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 304 P.3d 217, 222 (Colo. 2013) (quotation marks omitted)), *abrogated on other grounds by Warne*, 373 P.3d 588.

AC, ¶¶46, 61.[10] Such allegations do not establish that Plaintiff was treated differently than another similarly situated group and are insufficient to survive a motion to dismiss. *See Crider*, 246 F.3d at 1288–89 (dismissing equal protection claim because Plaintiffs "failed to allege facts sufficient to establish that they are similarly situated to" the other entity they claimed was treated differently); *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (affirming district court's dismissal of equal protection claim in part because Plaintiff failed "to identify any individual or group situated similarly to himself"); *Kovac v. Wray*, 363 F.Supp.3d 721, 760 (N.D. Tex. 2019) (dismissing equal protection claim partially because "Plaintiffs have not alleged a plausible comparison to similarly situated groups"). Plaintiff's failure to allege facts establishing that some taxpayers have been treated differently from other similarly situated taxpayers requires dismissal of Count I.

2. Plaintiff does not allege facts sufficient to overcome the applicable presumption of rationality.

Plaintiff does not allege that a qualifying fundamental right or suspect class is implicated.[11] As a

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[10] These allegations are conclusory statements not entitled to assumption of truth. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012) (concluding allegation that Plaintiff "was subjected to a false investigation and false criticism" was "entirely conclusory").

[11] While Plaintiff asserts a "violation of fundamental rights," he does not specify which fundamental rights he is referring to. *AC*,

result, the rational basis test is the applicable standard. *Van Dorn Retail Mgmt., Inc. v. Denver*, 902 P.2d 383, 387 (Colo. App. 1994); *see also AC*, ¶63. And Plaintiff must "allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Brown*, 63 F.3d at 971. An equal protection claim fails "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) (quotation marks omitted). Count I does not pass muster.

Count I is based on Plaintiff's allegation that DOR applied "standards to evaluate [the] tax credits" claimed by some taxpayers "which are not legally supported and which are not applied to other taxpayers." *AC*, ¶61. These "standards" were applied by DOR pursuant to Section 522 and Section 522.5. *See generally AC*. These statutes have legitimate governmental objectives, as discussed in Section 522.5(1) and in the Statutory Background section above. The Amended Complaint does not allege facts sufficient to overcome the presumption of rationality that applies to Defendants' actions and so Count I must be dismissed.

C. Plaintiff fails to state a due process claim.

It is unclear whether the Amended Complaint alleges a substantive or procedural due process claim. However, it fails to state a claim under either standard, so Count II must be dismissed.

¶72. Such a conclusory statement is not accepted as true. *Iqbal*, 556 U.S. at 678–81.

1. Plaintiff fails to allege a protected interest or lack of adequate process.

To state a valid procedural due process claim, Plaintiff must establish two elements: (1) the existence of a constitutionally protected property or liberty interest and (2) that the existing procedures related to that interest fail to provide the process that is constitutionally due. *Watso v. Colo. Dep't of Social Servs.*, 841 P.2d 299, 304 (Colo. 1992). Plaintiff does not allege facts sufficient to demonstrate the existence of a protected property interest or that any member of the putative class has not been afforded an appropriate level of process.

Plaintiff alleges that DOR "ha[s] deprived taxpayers of valuable property interests" but does not state what those "property interests" are. *AC*, ¶72. Plaintiff appears to argue that he and the putative class had a property interest in their claimed tax credits. *Id.* at ¶70. That is wrong. DOR was vested with authority to review and reject the validity and amount of any CE tax credit claim. § 39-22- 522(3.5)(a)(I), C.R.S. Taxpayers' unilateral expectation that their credit claims would be accepted as valid is insufficient to support a property interest. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (explaining that to have a property interest in a benefit, a person "must have more than a unilateral expectation of it," he must "have a legitimate claim of entitlement to it"). This is especially the case with tax credits because taxpayers bear the burden to demonstrate the credits' validity and value. *See, e.g., Schumacher*, 931 F.2d at 652; *see also DeHarder Inv. Corp. v. Ind. Hous. Fin. Auth.*, 909 F. Supp. 606, 613–14 (S.D. Ind. 1995) (concluding low-

income housing tax credits are not property interests protected by the Due Process Clause).

Further, Plaintiff does not allege that Defendants failed to afford the appropriate level of process. "The essential requirements of due process … are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). As described in the Statutory Background section above, CE tax credit claimants receive notice of credit disallowance and have multiple opportunities to respond. Plaintiff himself litigated a CE tax credit case in State district court and chose to settle with DOR before trial. The Amended Complaint does not allege facts supporting a conclusion that either Plaintiff or any member of the putative class have not received notice of the disallowance of their claimed tax credits or did not have an opportunity to respond to that disallowance.

2. Plaintiff fails to allege a protected interest, fundamental right, or conscience-shocking behavior.

To state a substantive due process claim, Plaintiff "must first allege sufficient facts to show a property or liberty interest warranting due process protection." *Crider*, 246 F.3d at 1289. As explained above, neither Plaintiff nor the putative class has a protected property interest in tax credits.

Even if the Amended Complaint alleged a sufficient property interest, it does not satisfy the second prong of a substantive due process claim: it "must allege facts sufficient to show that the challenged governmental action was 'arbitrary and capricious.'"

Crider, 246 F.3d at 1289 (citation omitted). Further, the "real issue" in substantive due process cases is "whether the plaintiff suffered from governmental action that either (1) infringes upon a fundamental right, or (2) shocks the conscience." *Seegmiller v. Laverkin City*, 528 F.3d 762, 768 (10th Cir. 2008).[12] Plaintiff alleges no government action that "shocks the conscience." The conduct of which Plaintiff complains, *AC*, ¶71, is conduct DOR has taken pursuant to statute.

While Plaintiff asserts a "violation of fundamental rights," he does not specify which fundamental rights he is referring to. *AC*, ¶72. Such a conclusory statement is not accepted as true. *Iqbal*, 556 U.S. at 678–81. Because Plaintiff does not allege that a qualifying fundamental right is involved, he must allege facts showing that the action complained of "does not further a legitimate state purpose by rational means." *Seegmiller*, 528 F.3d at 772. The Amended Complaint does not satisfy this standard. Count II must be dismissed.

D. Plaintiff fails to state a Takings Clause claim because a voluntary gift cannot constitute a governmental taking.

Plaintiff's Takings Clause claim alleges that by denying tax credit claims, Defendants have taken

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[12] Cases following *Seegmiller* question its application of *both* the fundamental right and shocks the conscience tests to government action, regardless of whether that action is legislative or executive. *Moya v. Garcia*, 895 F.3d 1229, 1243–44 (10th Cir. 2018) (McHugh, J., concurring in part and dissenting in part). However, deciding that issue is unnecessary here where it is unclear whether Plaintiff complains of a legislative or executive action (or both) and where Plaintiff fails to satisfy either test.

property without providing just compensation. *AC*, ¶¶74–80. However, the Amended Complaint acknowledges that the taxpayers *donated* the CEs, the property Plaintiff claims was "taken." *AC*, ¶¶12–14, 31, 40, 54, 56, 75–78. As a result, the Amended Complaint fails to state a Takings claim.

A property interest that is *voluntarily given* is not "taken" by the government. To receive tax credits, CE donors must establish that their CE donations were charitable contributions. 26 U.S.C. § 170 (providing tax benefits for charitable contributions, one of which is the CE deduction); § 39-22-522(2), C.R.S. (incorporating 26 U.S.C. § 170(h)). "The phrase 'charitable contribution,' as used in [26 U.S.C. § 170], is synonymous with the word 'gift,'" or a "voluntary transfer of property by the owner to another without consideration." *Grinslade v. Comm'r*, 59 T.C. 566, 573 (1973). So, by the very definition of a "charitable contribution," taxpayers must have donated their CEs voluntarily to claim tax credits.

Since taxpayers were under no compulsion to donate their CEs, there can be no governmental taking here. *See, e.g., L.L. Nelson Enters., Inc. v. Cty. of St. Louis*, 673 F.3d 799, 806 (8th Cir. 2012) ("When a person voluntarily surrenders liberty or property, the State has not *deprived* the person of a constitutionally-protected interest.") (emphasis in original); *see also BMR Gold Corp. v. U.S.*, 41 Fed. Cl. 277, 283 (1998); *Madis v. Higginson*, 434 P.2d 705, 706–07 (Colo. 1967) (rejecting takings claim based on voluntary conveyance of easement). Further, donors could choose whether to donate their CEs to either a governmental entity or to a private charitable organization, § 39-22-522(2)(a), C.R.S., so CE donors did not necessarily even give property to the government.

"Put simply, a property owner cannot give

property to the government of his or her own volition, and then proceed to argue that the government must compensate the owner for that contribution." *AFT Mich. v. State*, 866 N.W.2d 782, 795 (Mich. 2015). The Amended Complaint fails to state a Takings claim.

E. Plaintiff fails to state an Ex Post Facto or Contracts Clause claim.

Plaintiff's Count IV alleges that DOR's application of the "Phased Approach" in Section 522.5 (i.e., "the 2011 legislation") violated both the Ex Post Facto and the Contracts Clauses of Colorado Constitution. *AC*, ¶¶82–86. The Amended Complaint again fails to state a claim, so Count IV must be dismissed.

1. Plaintiff fails to state an Ex Post Facto Clause claim or a claim against an unconstitutionally retrospective law because Section 522.5 is a civil and procedural statute.

The Colorado Constitution's Ex Post Facto Clause bars "retroactive application of legislation which make previously lawful behavior *criminal* or which imposes additional punishment to that prescribed when the act was committed." *Wood v. Beatrice Foods Co.*, 813 P.2d 821, 823 (Colo. App. 1991) (emphasis added). The Ex Post Facto Clause does not apply to Section 522.5, which details the civil—not criminal—procedures for litigation of disallowed CE tax credits.

Plaintiff also alleges that Section 522.5's "Phased Approach" has been applied "retrospectively." *AC*,

¶¶83–85. "A statute is retrospective if it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002) (quotation marks omitted). Plaintiff does not allege facts that plausibly support a claim of retrospective application for two reasons.

First, Plaintiff's allegations do not plausibly demonstrate even that Section 522.5 was applied *retroactively*. Application of the Phased Approach to an administrative hearing initiated after a tax credit was claimed on a tax return is not a retroactive application. *See, e.g.*, *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 275 (1994) ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."). Instead, it is prospective application of a procedure to a hearing initiated after the underlying CE tax credit claim was disallowed.

Second, even if Section 522.5 had been applied retroactively, there is no constitutional issue with retroactive application of a change in law that is procedural or remedial, as opposed to substantive. *DeWitt*, 54 P.3d at 854. The "abolition of an old remedy, or the substitution of a new one, neither constitutes the impairment of a vested right nor the imposition of a new duty, for there is no such thing as a vested right in remedies." *People v. D.K.B.*, 843 P.2d 1326, 1332 (Colo. 1993) (quotation marks omitted). The adoption of the Phased Approach was a "procedural" change. § 39-22-522.5(1)(e), (f), (g), C.R.S. The district courts and DOR hearing officers already had authority to order separate trials of issues or parties; Section 522.5's Phased

Approach merely confirmed authority that already existed. *See* C.R.C.P. 42(b); § 24-4-105(4)(a), C.R.S. Plaintiff fails to allege an Ex Post Facto Clause claim or a claim of retrospective application.

2. Plaintiff fails to allege impairment of any contractual provision or facts regarding the lack of reasonableness or necessity to an important government purpose.

Plaintiff alleges that Defendants "impaired contracts that donors have with third parties who purchased tax credits and with the other parties involved in effectuating the transactions resulting in the transfers." *AC*, ¶85. To survive a motion to dismiss, sufficient facts must be alleged regarding the following elements of a Contracts Clause claim: (1) whether the state action has "'operated as a substantial impairment of a contractual relationship'" and (2) "whether the impairment was 'reasonable and necessary to serve an important government purpose.'" *United Auto., Aerospace, Agric. Implement Workers of Am. Intl. Union v. Fortuño*, 633 F.3d 37, 41 (1st Cir. 2011) (quoting *Energy Reserves Grp. v. Kan. Power and Light Co.*, 459 U.S. 400, 411 (1983); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)); *accord DeWitt*, 54 P.3d at 858. Plaintiff has not pleaded such facts.

Plaintiff has not alleged any specific contractual provisions that were substantially impaired by Section 522.5. *AC*, ¶¶82–86. Instead, Plaintiff makes "mere conclusory statements," *Iqbal*, 556 U.S. at 678, that Defendants "impaired contracts." *AC*, ¶¶85–86. In addition to failing to state any allegations regarding

substantial impairment, Plaintiff has also failed to allege any facts regarding the lack of reasonableness or necessity to serve an important government purpose. *See Fortuño*, 633 F.3d at 45–47. Count IV must be dismissed.

F. Plaintiff fails to state a claim for malicious prosecution.

To state a claim for malicious prosecution, Plaintiff must allege the following: "(1) the defendant[s] contributed to bringing a prior action against the plaintiff; (2) the prior action ended in favor of the plaintiff; (3) no probable cause; (4) malice; and (5) damages." *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007). Because Plaintiff does not allege facts that plausibly support *any* of these elements, Count V must be dismissed.

Although the Amended Complaint mentions "tax administrative prosecutions," *AC*, ¶87, it does not allege that such prosecutions are qualifying "prior actions" that Defendants "contributed to bringing." The Amended Complaint does not allege that Plaintiff was prosecuted for tax law violations or that any Defendant initiated any civil action against him. The "tax administrative prosecutions" the Complaint refers to appear to have been disallowances of tax credits that were claimed on Colorado tax returns. However, such disallowances resulted in civil actions filed by the taxpayers as *Plaintiffs* against DOR as a *Defendant*. For example, the 2011 case was filed by Plaintiff here (Mr. Emick) as *plaintiff* against DOR as a *defendant*. Prowers County District Court Case No. 2011CV101. Similarly, Plaintiff was a member of the *plaintiff* (Landowners United) in the federal action filed against

multiple State officials as *defendants*. D. Colo. Case No. 16-cv-00603. So, neither of these cases qualify as a "prior action" brought *by* the current Defendants *against* the current Plaintiff (which is what a malicious prosecution claim requires).

Perhaps most importantly, Plaintiff does not allege that any prior action between him and Defendants ended in his favor. *See AC*, ¶¶87–89; *Hewitt*, 154 P.3d at 411. Nor could he make such an allegation because his 2011 case ended in settlement and dismissal of all claims against DOR and its employees. And *Landowners United* also ended in dismissal. Dismissal of an action is not a favorable ending for a plaintiff. Similarly, "a settlement does not constitute favorable termination for purposes of a malicious prosecution action." *Hewitt*, 154 P.3d at 415.

Further, Plaintiff does not allege that any "prior action" against him lacked "probable cause," that Defendants acted with malice in bringing an "action," or that Plaintiff suffered damages from it. The allegation that DOR "offered zero value" for "disputed conservation easements," *AC*, ¶88, does not satisfy any of the elements of a malicious prosecution claim. Because it fails to allege facts supporting any of the elements of a malicious prosecution claim, the Amended Complaint fails to state such a claim and Count V must be dismissed.

G. Each of Plaintiff's constitutional claims are untimely.

Even if the Amended Complaint somehow stated one cognizable claim, all of Plaintiff's constitutional claims (Counts I–IV) are also barred by the statute of limitations. Each of Plaintiff's constitutional claims

must have been filed within two years after the cause of action accrued. § 13-80-102(1)(h), C.R.S. (providing statute of limitations for "actions against any public or governmental entity or any employee of a public or governmental entity"); *see also Bad Boys of Cripple Creek Mining Co. v. City of Cripple Creek*, 996 P.2d 792, 795 (Colo. App. 2000) ("Section 13-80-102(1)(h) applies to all actions against governmental entities, regardless of the theory upon which suit is brought.").

Plaintiff's claims accrued when he discovered or reasonably should have discovered the injury, loss, damage, or conduct giving rise to his cause of action. § 13- 80-108(8), C.R.S. As discussed above—and based on facts which are judicially noticeable—Plaintiff's CE tax credit was disallowed in 2009 and Plaintiff filed a lawsuit in district court in 2011. The latest Plaintiff knew or should have known of the injury that is the basis for his constitutional claims[13] was in 2009 when his CE tax credit was disallowed. Because Counts I–IV accrued more than two years before October 23, 2020 (the date this action was filed), these claims must be dismissed. *See SMLL, LLC v. Peak Nat. Bank*, 111 P.3d 563, 564 (Colo. App. 2005).

H. Plaintiff has no right of action for damages.

The Amended Complaint requests that settlement agreements "be declared null and void" and that Defendants repay "any funds" received pursuant

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[13] Because a malicious prosecution claim does not accrue until the favorable termination of a prior action, *Hewitt*, 154 P.3d at 412, Plaintiff's malicious prosecution claim has never accrued (since Plaintiff has no prior action with a favorable termination).

to those agreements. *AC*, pp.16, 18. So, Plaintiff requests damages. But Plaintiff cites no statute that provides him or the putative class with a right of action for damages. And, as discussed below, the Colorado Constitution does not provide Plaintiff with a right of action for damages. As a result, Plaintiff's claims for damages must be dismissed. *See Macurdy v. Faure*, 176 P.3d 880, 883 (Colo. App. 2007) (dismissal for failure to state a claim appropriate where statute does not provide right of action).

Plaintiff seeks damages under the Colorado Constitution. *AC*, Counts I and II. However, the Colorado Supreme Court has refused to recognize a right of action for damages resulting from violation of state constitutional rights when such relief is not authorized by statute and other adequate remedies exist. *Douglas Cty. v. Sundheim*, 926 P.2d 545, 549–50, 553 (Colo. 1996). Plaintiff does not cite any statute supporting his damages claim and has already taken advantage of an adequate remedy.

Section 522.5(2) provided Plaintiff with an adequate remedy to challenge the disallowance of his claimed CE tax credits. Plaintiff already litigated the validity and value of his CE tax credits and then chose to settle his claims with DOR. Because Plaintiff had an adequate remedy and cites no statute that authorizes his damages claim, his request for damages under the Colorado Constitution must be dismissed.

I. Plaintiff fails to state a claim for declaratory relief.

Plaintiff's final claim for declaratory relief is based on his preceding claims for relief. *AC*, ¶¶91–93. For the reasons discussed above, Plaintiff fails to state a claim for declaratory relief and this claim should be dismissed.

CONCLUSION

For all these reasons, Defendants request that the Complaint be dismissed.

Dated this 16th day of June, 2021.

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