BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Lori Hvizda Ward, Laura Michelle MacWaters, and Rogena Sue Johnson,
Objectors,

v.

Gina Steadman and Rich Guggenheim,
Designated Representatives of Initiative 2023-2024 #220.

MOTION FOR REHEARING ON
INITIATIVE 2023-2024 #220

Through their legal counsel, Lori Hvizda Ward, Laura Michelle MacWaters, and Rogena Sue Johnson, registered electors of Larimer County, respectively, hereby file this motion for rehearing on Initiative 2023-2024 #220.

The Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #220:

> *Shall there be a change to the Colorado Revised Statutes restricting participation in female public school athletic programs based on biological sex at birth, and, in connection therewith, requiring a public school, a private school, or a school activities association to designate each interscholastic, intramural, or club athletic team or event as female, male, or coeducational; only allowing females as listed on their original birth certificate to compete in female-designated teams or events; and allowing a student who suffers harm to sue the school, school district, or school activities association?*

In setting this title, the Board erred in the ways set forth below.

I. The Board lacked jurisdiction due to #220's single subject violations.

A. Mandating that the State "assume financial responsibility" for "any lawsuit or complaint" is a public subsidy to private groups and an additional subject of this initiative.

This initiative requires every cost associated with "any lawsuit or complaint" to be absorbed by the State of Colorado. As the Fiscal Summary for Initiative 220 pointed out, "Because the state is financially responsible for expenses related to lawsuits or complaints, the measure has an indeterminate and potentially significant impact on state expenditures."[1]

[1] https://leg.colorado.gov/sites/default/files/initiatives/2024%2523220FiscalSummary_00.pdf (last viewed on March 26, 2024).

This initiative thus requires the State to pay over to schools and school districts, as well as against "any other organization that hosts, organizes or facilitates public school athletics" and also "private school[s that] compete against a public school," see Proposed Section 22-32-116.6(1)(b), any expenses from any litigation or "complaints." Initiative #220 thus sets up a scheme for state payments to private organizations that have no governmental function.

This is not just a state backfill of local governmental expenses; it is subsidy to private organizations. Proposing to pay private litigation expenses out of public funds is certainly atypical and would surprise voters as a new policy that is coiled in the folds of a measure, ostensibly dealing with public schools. Moreover, it presents the exact conundrum the single subject requirement is meant to avoid – forcing voters to accept something they oppose to get something they support. *See In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37 ¶23; 526 P.3d 927. Thus, this measure violates the single subject requirement.

B. Regulating the policies of non-governmental organizations, such as one that "hosts, organizes, or facilitates public school athletics," is another subject of this initiative.

Proponents not only seek to regulate the placement of students on public school teams. They also include in their definition of "public athletics programs for minors" any organization that "hosts, organizes, or facilitates" public school athletics. Proposed Section 22-32-116.6(1)(b).

In other words, Initiative #220 holds out that it deals with public school athletics. But then, it uses overly broad language to take aim at organizations' privately set standards, such as those adopted by the Colorado High School Activities Association ("CHSAA"). CHSAA's Constitution "recognizes the right of transgender student-athletes to participate in interscholastic activities" without discrimination. Specifically, such athletes' involvement is based on a transgender student-athlete's home school's "confidential evaluation to determine the gender assignment for the prospective student-athlete."[2] Proponents thus seek to prevent organizations like CHSAA from implementing standards that provide for participation in school activities (based on gender assignment based on student evaluation vs. biological sex at birth) to create legal violations and the basis for litigation where a student senses even an "indirect" psychological or emotional harm or feels she has been "deprived" of an athletic opportunity. Proposed Section 22-32-116.6(3)(a).

Just as the Supreme Court has ruled that an attempt at *direct* product regulation (say, authorizing sale of wine in grocery stores) was a separate subject from an effort to *indirectly facilitate* that regulated product (authorizing delivery service of alcohol), so is the direct regulation of what happens at schools and the indirect regulation of what happens in organizations that "organize" or "facilitate" those events. *In re Titles for #67, #115, & #128, supra*, 2022 CO 37 ¶20 (initiative cannot have "such a general focus that it could encompass a nearly limitless array of subjects"). Therefore, this measure violates the single subject requirement.

[2] CHSAA Constitution, Article 3, § 300.3 (https://chsaanow.com/sports/2021/7/19/bylaws.aspx, last viewed March 26, 2024).

C. Regulating the activities of any "private school whose students or teams compete against a public school" is still another subject of this initiative.

The definition of "public athletics program for minors" specifically includes any "private school whose students or teams compete against a public school." Proposed Section 22-32-116.6(1)(b). This aspect of the initiative is far-reaching and unexpected, to say the least.

1. Just one game will convert a private school into a "public athletics program" forever.

Under #220, a private school is really a "public athletics program" if, at any time, its student or teams compete against just a single public school. If there is one pre-season scrimmage in one sport between a private and public school, involving two private school students, the private school is automatically converted to a "public" athletics program. The measure doesn't limit that designation to that single competition or even that school year. Without words of limitation, there is no safe harbor for a private school; any contest involving two or more private school students against a public school under #220 makes it a public school indefinitely. *See Hernandez v. Ray Domenico Farms, Inc.*, 2018 CO 15, ¶7, 414 P.3d 700 (with "no words of limitation," there were no limits on statutory remedy); *A.M. v. A.C.*, 2013 CO 16, ¶20, 296 P.3d 1026 (given Court's "declination to read words into a statute that do not appear on its face" and "the absence of words of limitation" in statute, there was no limit on certain persons' right to participate in litigation).

2. *Any* form of competition between a public and private school converts the private school into a public school.

Additionally, the clause dealing with private schools does not require that the competition happen on an athletic field. If any of a private school's "students or teams compete against a public school," the private school is converted into a public athletics program for minors under #220. This provision is triggered when a private school's debate team or esports team (both sanctioned competitions of CHSAA) compete against a public school.[3]

The proponents' use of "or" before "a private school" means the "private school" reference operates independently of the language that precedes it, and the earlier reference to "public school athletics" does not modify the next phrase dealing with private school competitions. *Holliday v. Bestop, Inc.*, 23 P.3d 700, 706 (Colo. 2001), citing C.R.S. § 2-4-101 (applying rules of grammar in interpreting statute); *Gatrell v. Kurtz*, 207 P.3d 916, 918 (Colo. App. 2009). "[W]here qualifying words are in the middle of a sentence, and apply to a particular branch of it, they are not to be extended to that which precedes or follows." *Red Flower, Inc. v. McKown*, 2016 COA 160, ¶23.

It would have been easy enough for proponents to insert "athletics program" after "private school whose students or team compete against a public school." They chose not to, and that decision has legal meaning. The final draft of #220 subjects private schools to this measure for incidental and/or unrelated competitions against a public school. Broadening the reach of their

[3] *See* https://chsaanow.com/news/2024/3/15/speech-debate-2024-5a-speech-and-debate-tournament-results.aspx; https://chsaanow.com/news/2023/9/22/everything-you-need-to-know-about-esports-this-fall.aspx (last viewed March 26, 2024).

measure in this manner has no more to do with public athletics programs than wine in grocery stores has to do with alcohol delivery services. Therefore, this initiative violates the single subject requirement.

D. Intramural contests, as a non-competitive, unrelated class of endeavors, is an additional subject when grouped with competitions between schools.

The measure applies to "any interscholastic, intramural, or club athletic team, sport, or athletic event." Proposed Section 22-32-116.6(2)(a).

Intramurals are contests within, not between, schools. "Intramural sports are recreational sports organized within a particular institution, usually an educational institution." https://en.wikipedia.org/wiki/Intramural_sports (last viewed Jan. 8, 2024); *see also* Merriam-Webster Online Dictionary (defining "intramural" as "competed only within the student body"), https://www.merriam-webster.com/dictionary/intramural (last viewed Jan. 10, 2024). Intramural sports have an entirely different purpose from club and interscholastic athletics. "The implementation of high school intramurals is meant to be an additional extracurricular option for non-varsity players and/or 'non-athletes' (those that are not out for a school sport)." https://www.pheamerica.org/2022/the-value-of-an-intramural-program-for-high-school-students/ (last viewed Jan. 8, 2024).

In Colorado, for instance, one school offers "an intramural sports program for students who prefer a shorter time commitment and less competitive sports environment," while another "offers several intramural opportunities for students in grades 9-12 with the purpose of providing a safe, enjoyable environment for students of any skill level to participate in a variety of recreational activities." *See* https://mcauliffe.dpsk12.org/athletics/club-sports-intramurals/ and https://www.edenpr.org/eden-prairie-high-school/activitiesathletics/activities-office/intramurals (last viewed Jan. 8, 2024).

Thus, regulating participation in highly competitive athletic events (varsity and junior varsity levels or club sports) is entirely different in policy and politics than setting standards for in-school, non-competitive contests. Combining tangentially related subjects presents the challenge often acknowledged by the Supreme Court: "the risk of surprising voters with a 'surreptitious' change… because voters may focus on one change and overlook the other." *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶41 (citations omitted).

II. The titles set are incomplete and misleading.

A. The titles fail to state that the measure allows any plaintiff – whether it is a student or public athletics provider – to sue for "psychological, emotional, or physical" harms.

"Harm," under the measure, comprises "psychological, emotional, and physical" harm suffered. Proposed Section 22-32-116.6(3)(b). Given the lawsuit-happy nature of #220, voters should know the extent of unprecedented litigation that will be spawned by this initiative.

B. The titles fail to state that the measure allows students and public athletics providers to be sued for any "indirect" harms.

Given the breadth of harms to be used as the basis for legal actions, voters should know that the scope of such actions are actually more expansive. Lawsuits may be filed to seek remedies for "indirect" harms. Proposed Section 22-32-116.6(3)(a). It's hard to know what this entails because the measure does not limit what "indirect" harms are compensable in the event of a violation. But it is clear that "indirect" harms do not have to arise in any clearly prescribed form or manner. *See Keim v. Douglas Cnty. Sch. Dist*., 2015 COA 61, ¶34 ("'Indirect' is defined as 'not proceeding straight from one point to another'"). At a minimum, voters should know that an undefined expanse of liability is part of what they are being asked to approve, especially where, as here, a measure is waiving sovereign immunity.

C. The titles fail to state that this initiative allows parties suing under its provisions to obtain "monetary damages," "injunctive relief," and "any other relief available under law" as well as attorney fees and costs.

Typically, the form of relief may not be as essential to be stated in a title as it is here. As outlined above, the sheer breadth of what is actionable under this measure makes the unlimited relief available a key feature to be brought to the attention of voters. *See, e.g., In re Title, Ballot Title and Submission Clause, and Summary for Proposed Amendment Concerning Unsafe Workplace Environment*, 830 P.2d 1031, 1033-34 (Colo. 1992) (title accurate where it used "any and all damages" consistent with initiative text).

D. The titles do not make it clear that the measure creates an exception to existing government immunity provisions.

The titles reference that the measure "allow[s] governmental liability for a civil action brought for noncompliance with this provision." They do not make clear that government is currently immune under the Colorado Governmental Immunity Act. The Board's practice is to be this explicit, even without needing to cite current law. For example, a legally sufficient title has stated that, under an initiative, a covered person "shall not be immune from suit." *Id.* at 1033. Language to this effect should be added to clarify this aspect of the titles.

E. The titles do not make clear that lawsuits can be filed against any organization that "hosts, organizes, or facilitates" an athletic event, as well as any private school that has an athletic event with a public school, as well as any private school that has students or teams that compete in any other way against a public school.

A student lawsuit may be filed against a "public athletics program for minors that caused the harm" alleged. Proposed Section 22-32-116.6(3)(a). The titles state that lawsuits may only be filed against a school, school district, or school activities association.

This summary description of potential defendants excludes any "other organization that hosts, organizes, or facilitates public school athletics" as well as "private school whose students or teams compete against a public school." Proposed Section 22-32-116.6(1)(b). And the titles do not

state that a single competition against a public school is all that is required to give "public school" status to a private school.

As discussed under the single subject violations noted above, the private potential defendants are the ones who are most hidden by this measure. They shouldn't also be hidden by the title, as such an omission is misleading to voters.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #220 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution, or correction of the misleading ballot title set.

Respectfully submitted this 27th day of March, 2024.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2023-2024 #220 was sent this day, March 27, 2024, via first-class mail, postage paid, to:

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