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J. WARD
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Colorado Secretary of State

BALLOT TITLE SETTING BOARD

IN THE MATTER OF PROPOSED INITIATIVE 2019-2020 #3

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2019-2020 #3

On behalf of Carol Hedges and Steve Briggs, representatives of the proponents of Proposed Initiative 2019-2020 #3, undersigned counsel hereby submits this Motion for Rehearing on said Initiative pursuant to Section 1-40-107, C.R.S. (2018), and as grounds therefore states as follows:

I. Title, ballot title and submission clause.

At its hearing on remand from the Colorado Supreme Court on July 17, 2019, the Title Board set the following title and ballot title and submission clause for Proposed Initiative 2019-2020 #3:

Title: “An amendment to the Colorado constitution concerning the repeal of the Taxpayer’s Bill of Rights (TABOR), Article X, Section 20 of the Colorado constitution.”

Ballot title and submission clause: “Shall there be an amendment to the Colorado constitution concerning the repeal of the Taxpayer’s Bill of Rights (TABOR), Article X, Section 20 of the Colorado constitution?”

The proponents respectfully object to these titles and submission clause. They do not fairly express the true meaning and intent of the proposed constitutional amendment. They also contain a “catch phrase” tailored to generate opposition to the measure in a political campaign while not contributing to – in fact, prejudicing and obfuscating – voter understanding of the issues presented and principle of the measure sought to be repealed.

The catch phrase in question is the reference to the measure sought to be repealed as “the Taxpayer’s Bill of Rights” or “TABOR.” This phrase (and secondarily its acronym) is drawn solely from the non-substantive section heading included within the text of Colo. Const. art. X, §20 by its drafters. In fact, it is not this section heading – but, rather, Colo. Const. art. X, §20 in its entirety – that the proponents seek to repeal. Appropriately, this catchy section heading did not appear in the ballot title of Colo. Const. art. X, §20, when submitted to and adopted by the voters in 1992. Nor should it appear in the title of the present initiative directed to repealing the same measure.

The Colorado Supreme Court has repeatedly cautioned that “catch phrases or slogans in the title . . . should be carefully avoided by the [Title] Board.” *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #258(A) (Garcia v. Chavez)*, 4 P.3d 1094, 1100 (Colo. 2000). The Court has noted that catch phrases “may form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment” – *Id.*, quoting *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #227 & #228 (Sarchet v. Hobbs)*, 3 P.3d 1, 6 (Colo. 2000) – and “encourage prejudice . . . and, thereby, distract voters from consideration of the proposal’s merits.” *Id.* The fact that the catch phrase or slogan in question is derived from the text of the measure to be adopted or repealed does not alter the direction that “the Title Board is not free to include this wording in the titles if, as here, it constitutes a catch phrase.” *Id.*

Inclusion of or reference to the phrase “Taxpayer’s Bill of Rights” (or “TABOR”) in the title indisputably and prejudicially suggests that the measure at issue seeks to repeal and eliminate “rights” currently held by Colorado’s taxpayers – indeed an entire “bill of rights” replete with all that connotes. It adopts a slogan – rife with inevitable prejudicial effect in a campaign – as the official state-sanctioned label for the measure at issue. Nothing could be more contrary to the Supreme Court’s guidance.

As important, the phrase and its acronym are wholly misleading and confusing. Colo. Const. art. X, §20 is not a “bill” or enumeration of “rights” – it is in fact an elaborate set of absolute prohibitions, mandates, and structural restrictions upon the ability of the voters and their elected representatives to formulate and adopt fiscal policy. Subsection (8)(a) wholly prohibits a variety of revenue producing options, with or without voter approval and irrespective of voter/taxpayer preferences, and thus wholly eliminates “rights” theretofore available to voters (including taxpayers). Rather than confer “rights,” subsection (5) mandates minimum levels of emergency reserves, and subsection (6) constrains the permissible sources and uses of emergency revenue. Subsection (9) eviscerates state mandates irrespective of statewide voter support. Subsection (4) structurally alters (and adds significant public expense to) the process by which the people may operate through their elected representatives to formulate and adopt policies concerning taxation and public debt – while conferring no new “rights” upon taxpayers and voters not already possessed through their powers of initiative and referendum under Colo. Const. art. V, §1. Subsection (7) constrains the ability of the people’s elected representatives even to retain and utilize revenue duly received – for any purposes – without again imposing an election upon voters already constitutionally empowered to require one if they wish. The purpose and principle underlying Colo. Const. art. X, §20 is not and has never been to create or enumerate “rights” for taxpayers; it is and has been to constrain those rights and alter the process by which they are exercised with the recited goal to “reasonably restrain most the growth of government” – subsection (1). This is very different from conferring “rights” – let alone a “bill of rights.”

The concern expressed by the Title Board at the initial hearing on July 17, 2019, was to formulate a title that is both brief – as required by C.R.S. §1-40-106(3)(b) – and yet sufficient to clearly inform the voters of the provision sought to be repealed. The proponents suggested that

identifying the provision to be repealed simply as “Article X, Section 20 of the Colorado constitution” would best accomplish that, without resort to catch phrases or potentially confusing acronyms of catch phrases.

If the Board wishes to go further, however, attention should be directed to the true intent and meaning of Initiative #3, which – as discussed at the initial hearing – is to restore the ability of the people’s elected representatives to determine the source and amount of revenue and expenditures. This informs the voters of the purpose of the provision. As the Court concluded in *In re Title, Ballot Title & Submission Clause for 2015-2016 #156 (Robinson v. Dierking)*, 2016 CO 56 (Colo. 2016), “In sum, the clear title requirement seeks to accomplish two overarching goals: prevent voter confusion and ensure that the title adequately expresses the initiative's intended purpose.” With this in mind, an appropriate title could read:

An amendment to the Colorado constitution restoring the ability of the people’s elected representatives to determine the source and amount of revenue and expenditures by repealing Article X, Section 20 of the Colorado constitution.

Should the Board believe that more is required, something along the following lines may meet that concern:

An amendment to the Colorado constitution repealing Article X, Section 20, to remove categorical prohibitions, restrictions, mandates, and preliminary voter approval requirements upon the ability of state and local elected representatives to adopt policies concerning the source, amount, and use of revenue and debt.

The proponents also respectfully submit that additional commentary or enumerations of detail in the title would inevitably create – rather than eliminate – voter confusion, obfuscate “the principle of the provision sought to be . . . repealed” – C.R.S. §1-40-106(3)(b) – and result in a ponderous and hopelessly convoluted and unclear title. “Indeed, overly detailed titles and submission clauses could by their very length tend to confuse voters.” *In re Proposed Initiative Concerning ‘State Personnel System,’* 691 P.2d 1121, 1124 (Colo. 1984). “The Board must use its discretion to determine whether it can fairly delineate or describe the law or constitutional provision to be repealed without unduly expanding the title . . . and without jeopardizing the impartiality of the designations that ultimately will be placed before the electorate.” *In re Title, Ballot Title & Submission Clause for Proposed Constitutional Amendment under Designation ‘Pregnancy,’* 757 P.2d 132, 137 (Colo. 1988). “There is no requirement that the provisions of the section to be repealed must be set out in the title and ballot title and submission clause.” *Id.* at 136. Further, “the Board is not required to state the effect that an initiative may have on other constitutional provisions.” *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Water Rights,* 877 P.2d 321, 328 (Colo. 1994).

II. Fiscal impact abstract.

The Proponents also are not satisfied with, and respectfully request reconsideration of, the abstract prepared by the Director of Research of the Legislative Council of the General Assembly with regard to Proposed Initiative 2019-2020 #3. The Proponents submit that commentary in the abstract regarding an expected economic impact of shifting a portion of the state's economy from the private sector to the public sector, as well as a corresponding reduction in household and business spending or saving, is wholly speculative regarding unknowable state and local legislative responses to the restoration of their core constitutional responsibilities, incorrect, misleading, and prejudicial.

First, the effect of repealing Colo. Const. art. X, §20, is wholly dependent upon future fiscal policy decisions and actions of the people's elected representatives at both the state and local level – as well as the voters' authorization, approval of, and response to those actions together with their direct participation in the policy making process as expressed at the polls, through public involvement in the legislative process at all levels of government, and through their own use of their rights of initiative and referendum – together with relevant and presently unknowable developments and trends in the local, state, and national economies. The restoration to the state and local legislative bodies of fiscal policy options presently constrained or subjected to expensive and repeated structural hurdles does not indicate which, if any, of those options may be adopted or when and under what circumstances that may happen.

Additionally, under the "State expenditures" section of the abstract, the reference to a reduction in "refunds to taxpayers" should only address "mandated refunds to taxpayers." The last sentence should also fairly note that lawmakers may also decrease spending.

It is critical to note that this repeal measure is silent on tax, spending, or fiscal policy. It is purely a measure that restores the structural relationship between the voters and their elected representatives as it existed prior to the adoption of Colo. Const. art. X, §20 in 1992. To assume the policy direction of future decisions in the context of decision-making authority that would be shared and result from a continuing interplay between voters and their elected representatives, is pure speculation. We respectfully ask that the abstract be rewritten to reflect that fact. In particular, the Economic Impact section of the abstract should be clear that future fiscal policy decisions cannot be determined at this stage.

Respectfully submitted this 24th day of July, 2019.

s/Edward T. Ramey

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