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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Petition for Review Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020, #3 **Petitioners:** Douglas Bruce, Steve Briggs, Carol Hedges, and William Banta, **v.** **Respondents/Proponents:** Carol Hedges and Steve Briggs, **v.** **Ballot Title Board:** Melissa Polk, David Powell, and Jason Gelender	**▲ COURT USE ONLY ▲**
Attorneys for Carol Hedges and Steve Briggs: Edward T. Ramey, #6748 Martha M. Tierney, #27521 Tierney Lawrence LLC 225 East 16th Avenue, Suite 350 Denver, CO 80203 Telephone: 720-242-7585; 720-242-7577 Email: eramey@tierneylawrence.com; mtierney@tierneylawrence.com	Supreme Court Case No. 2019SA183

ANSWER BRIEF OF PETITIONERS/PROPONENTS CAROL HEDGES AND STEVE BRIGGS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 3,397 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☑It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☐It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

By: *s/Edward T. Ramey*

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Petitioners/Proponents adopt the Statement presented in their Opening Brief.

STATEMENT OF THE CASE

Petitioners/Proponents adopt the Statement presented in their Opening Brief.

SUMMARY OF THE ARGUMENTS

1. The title, ballot title and submission clause. The Title Board set the following title for Proposed Initiative 2019-20, #3 (the Proposed Initiative):

> 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.

As submitted by the Petitioners/Proponents in their Opening Brief, this title adopts and highlights an impermissible catch phrase – "Taxpayer's Bill of Rights." Lifted from the internal section heading grafted into Colo. Const. art. X, §20 by its own drafter(s), the phrase is emotionally laden, suggestive of a wholly inapt historical parallel, and prejudicial to a fair consideration by the voters of the current proposal to repeal Colo. Const. art. X, §20. As important, the catch phrase is descriptively inaccurate and misleading as to the content of the measure sought to be repealed.

In addition, the title omits any statement of the statutorily required "true intent and meaning" of the Proposed Initiative, its intended purpose. As explained in the Opening Brief of Petitioners/Proponents, the intended purpose of the Proposed Initiative is to restore the ability of the people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures.

Finally, the Petitioners/Proponents object to the proposals of Petitioners Bruce and Banta to expand the title into a lengthy and selective itemization of elements of Colo. Const. art. X, §20 (again mischaracterized and misrepresented as "rights"). Any such selective listing is inherently confusing and misleading.

2. The fiscal impact abstract. The fiscal impact abstract adopted by the Title Board states that the Proposed Initiative "is expected to increase revenue and spending for state and local governments over the long term" and "shift[] a portion of the state's economy from the private sector to the public sector."

As submitted in their Opening Brief, Petitioners/Proponents object to such a speculative prediction of "economic impacts" of unknowable future fiscal policies that may or may not be adopted by myriad state and local governmental districts. The Proposed Initiative does not adopt, define, or suggest any fiscal policy. It would merely remove a set of impediments upon the ability of the people and their

elected representatives to determine fiscal policies at all governmental levels. Speculation of this nature is inaccurate, misleading, and prejudicial to fair consideration of the Proposed Initiative.

ARGUMENT

I. The Title, Ballot Title and Submission Clause Set by the Title Board are Insufficient, Unfair, and Misleading.

A. Standard of Review and Preservation of Issue.

Petitioners/Proponents and the Title Board concur regarding the standard of review. Petitioners/Proponents do not object to the statement of Petitioner Banta except to the extent of his invocation of an "arbitrary and capricious" review standard. Petitioner Bruce does not state a standard of review.

Petitioners/Proponents agree that this issue has been preserved by all parties.

B. The Titles Set by the Title Board are Unfair and Misleading in that They Contain a Misleading and Prejudicial Catch Phrase That Misrepresents the Content of Colo. Const. art. X, §20.

As Petitioners/Proponents noted in their Opening Brief, catch phrases are prohibited in titles, for good reason. They work in favor of a proposal without contributing to voter understanding. They trigger a favorable response to a proposal (or unfavorable response to its repeal) based not on its content but on its wording." *Bentley v. Mason (In re Title, Ballot Title and Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 634 (Colo. 2016). The phrase, "Taxpayer's Bill of

Rights" is not only a catch phrase; it is misleading as to the contents of Colo. Const. art. X, §20 – and thus as to its proposed repeal.

The Title Board argues that Petitioners/Proponents have failed to present any evidence that the phrase, "Taxpayer's Bill of Rights," is a catch phrase. The argument misses the very point that a catch phrase is self-evident. On its face it draws attention to itself, and it triggers a favorable response to the measure proposed, or in this case an unfavorable response to its repeal. *Cf., Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 649-50 (Colo. 2010) (specifically rejecting evidence of polling results and usage of terms by advocacy groups as relevant to the presence or absence of a catch phrase). As this Court has observed, the presence of a catch phrase is to be determined "in the context of contemporary political debate. . . . Our task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal." *Garcia v. Chavez (In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #258(A))*, 4 P.3d 1094, 1100 (Colo. 2000). The phrase, "Taxpayer's Bill of Rights," is a perfect example of a phrase that on its face will draw an unfavorable response to its proposed repeal – while contributing nothing to an understanding of the content of the underlying provisions.

The Title Board relies on the fact that this Court has referred to the phrase, "Taxpayer's Bill of Rights," many times since its enactment. The reliance is misplaced. In not one case was the Court referring to the phrase as an accurate summary of the contents of Colo. Const. art. X, §20. It was in every case a shorthand reference to the article and section number itself.

Contrary to the argument of the Title Board, the fact that the drafters of the initiative that became Colo. Const. art. X, §20 chose to graft the catch phrase "Taxpayer's Bill of Rights" into the textual heading for the measure provides no safe harbor for its use in the title of an initiative to repeal Colo. Const. art. X, §20. The drafters were free to use any language they chose in their initiative. The proponents were free to use it, and did use it, in their campaign for the enactment of Colo. Const. art. X, §20. This does not make it proper, however, in the title of an initiative to repeal Colo. Const. art. X, §20, where it could be used in a campaign against its repeal.

The use of the phrase, "Taxpayer's Bill of Rights," in the title of the Proposed Initiative is made worse in that it violates the separate requirement that the title not be misleading. *Bentley, supra*; *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #85)*, 328 P.3d 136, 141 (Colo. 2014). As discussed in the Opening Brief of Petitioners/Proponents, the content of Colo.

Const. art. X, §20, is an amalgamation of requirements, restrictions, prohibitions, and limitations on the ability of the people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures. For example, subsection (8) is a complete prohibition on certain sources of revenue that applies not only to elected representatives, but also to directly taxpayers. It is anything but a "taxpayer's bill of rights."

Voters will not be "confused," as argued by the Title Board, by omitting a misleading and politically laden catch phrase from the title of the Proposed Initiative. To the extent voters may not already be aware of the general content of Colo. Const. art. X, §20, they will have the benefit of extensive campaign analysis and advocacy, as well as easy news and internet access to the content of the measure. Further, voters will have the benefit of "[a] fair and impartial analysis of [the Proposed Initiative], which shall include a summary and the major arguments both for and against the measure, and which may include any other information that would assist understanding the purpose and effect of the measure." Colo. Const. art. V, §1(7.5); §1-40-124.5(1.7)(a), C.R.S. (2019). Providing an unfair, inaccurate, and misleading catch phrase in the title is not helpful, and it is most certainly not a solution to the requirement of providing a title that is not unfair or misleading.

C. The Titles Set by the Title Board Violate Statutory Title Requirements by Failing to State the Principle of the Provision Sought to be Repealed or the True Intent and Meaning of Proposed Initiative

The Title Board must comply with applicable statutory standards in setting a title. These include that the title shall express the true intent and meaning of the proposal. §1-40-106(3)(b), C.R.S. (2019).

The true intent and meaning of a proposal is its intended purpose. *See Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016). As Petitioners/Proponents discussed in their Opening Brief, and as they have made clear in every stage of the administrative proceedings, the intended purpose of the Proposed Initiative is to restore the ability of the people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures.

The Title Board argues that the "intended purpose" of the Proposed Initiative is instead simply to repeal Colo. Const. art. X, §20. The Board relies on the statement in this Court's earlier decision that the Proposed Initiative has only "one general objective or purpose, namely, the repeal of TABOR." *In re Proposed Initiative 2019-2020 #3*, 442 P.2d 867, 870 (Colo. 2019). The argument takes this Court's statement out of context and confuses the intended purpose with the *mechanism* for achieving that intended purpose.

The Court was using the reference to "one general objective or purpose" to describe the single subject of the Proposed Initiative. In this context, the statement was accurate. The "objective," in the sense of the specific immediate result desired, the single subject, is the repeal of Colo. Const. art. X, §20. The repeal, however, is in the nature of a simple mechanical act. The question that the Board's argument does not answer, and the question that voters are entitled to have answered, is this: *Why* repeal Colo. Const. art. X, §20? In other words, what is the intended purpose of the repeal?

Without knowing the intended purpose of the repeal of Colo. Const. art. X, §20, voters have no way of knowing why they should or should not vote in favor of the Proposed Initiative. Informing voters of the intended purpose for the repeal is a vital component in meeting the statutory requirement that the Title Board avoid setting a title for which the general understanding of the effect of a "yes" or "no" vote will be unclear. §1-40-106(3)(b), C.R.S. (2019). Simply put, voters are entitled to know that the intended purpose of the repeal is to restore the ability of the people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures.

Because the Title Board set titles that fail to state the intended purpose of the Proposed Initiative, the titles violate the statutory requirement and are insufficient,

unfair, and misleading. The Title Board's decision must therefore be reversed. *See, e.g.*, *Robinson, supra* (the Court will only reverse the Title Board's decision if the titles are insufficient, unfair, or misleading).

D. The Titles Urged by the Opponents of the Proposed Initiative are Inherently Confusing and Misleading.

The title need not spell out every detail of a proposal. *See Bentley, supra.* To require an item by item listing and paraphrasing of the constitutional amendment to be repealed would undermine the intent of providing a relatively short, plain, and understandable statement that sets forth the central feature of the initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 62*, 961 P.2d 1077, 1083 (Colo. 1998). Indeed, the definition of "Title" is "a *brief* statement that fully and accurately represents the true intent and meaning of the proposed text of the initiative." §1-40-102(10), C.R.S. (2019) (emphasis added).

The opponents of the Proposed Initiative point to this Court's observation that if a choice must be made between brevity and a fair description of essential features of a proposal, the decision must be made in favor of full disclosure to the registered electors." *In re Title, Ballot Title & Submission Clause and Summary Pertaining to Proposed Election Reform Amendment*, 852 P.2d 28, 32 (Colo. 1993). This "choice" was posed in the context of a title setting process including presentation of a full Summary of the measure (no longer included).

Petitioners/Proponents nevertheless agree that the title should be fair and informative. And to be so it should be short and digestible.

As an initial matter, as this Court has noted, "[t]here is no requirement that the provisions of the section to be repealed must be set out in the title." *In re Proposed Constitutional Amendment under Designation "Pregnancy"*, 757 P.2d 132, 136 (Colo. 1988). The Title Board in the present case has certainly concurred. Further, this Court has emphasized that "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). In the end, the Court's direction has been that "[t]he 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 "Pregnancy*," 757 P.2d at 137. With the exception of the catch phrase, the Board has attempted to do so in this case.

The opponents of the Proposed Initiative have each cherry picked a list of their favorite provisions of Colo. Const. art. X, §20 to be included in the Title. This ignores that Colo. Const. art. X, §20 contains a complex and voluminous collection of specific, technical, and disparate policy and implementation

provisions. Local districts may consider some provisions salient; the state may consider others salient; one group of voters may consider still another mix of provisions salient; while yet another group of voters may consider yet another mix salient. Some of the provisions are limitations specifically upon the powers of elected representatives. Some are outright policy prohibitions directed to both the voters – *i.e.*, taxpayers – and their elected representatives. Some are specific policy mandates. All, those suggested by the opponents and those the opponents wish to ignore, to varying degrees restrict the power and ability of the people – acting directly and through their elected representatives – to determine the sources and amounts of public revenues and expenditures.

Even with the selective lists suggested by the opponents of the Proposed Initiative, both opponents would preface their entries with phrases like "ending the right to vote." As an initial matter, the repeating phrase is both prejudicial and misleading in a title – as the people would fully retain the right to vote via initiative and referendum. Even were Colo. Const. art. X, §20's automatic election mandates removed, language of this nature is flatly incorrect. The repeal would in fact restore the people's right to vote (directly and through their elected representatives) for fiscal policy options (such as graduated income taxes and state real property taxes) now wholly prohibited by Colo. Const. art. X, §20. Further, the

selected lists of requirements, restrictions, prohibitions, and limitations may be considered "rights" by some voters, but expensive and unnecessary burdens and barriers by others. Finally, such a repeating introduction to the list is just another misleading form of a "catch phrase."

It is also unnecessary to resort to such lists. As previously discussed, voters will have the benefit of extensive campaign analysis and advocacy, news coverage, and a fair and impartial analysis of the Proposed Initiative, including a summary and major arguments for and against. Const. art. V, §1(7.5); §1-40-124.5(1.7)(a), C.R.S. (2019).

In sum, Colo. Const. art. X, §20, is a unique combination of numerous complex, specific, technical, and disparate policy provisions. No one grouping of provisions would be considered salient by any one group of voters. No one grouping accurately summarizes its content. No one grouping accurately reveals the entirety of its amalgamation of provisions. Even ignoring that there is no requirement that the provisions of the section to be repealed must be set out in the title, it is simply impossible to select a limited list of provisions that would not be insufficient, unfair, and misleading, and thus would not be proper in the title. *See, e.g., Robinson, supra.*

II. The Fiscal Impact Abstract Adopted for the Proposed Initiative Incorporates Predictions of "Economic Impacts" That Are Wholly Speculative and Dependent Upon Presently Unknowable Future Decisions by Lawmakers and Voters.

A. Standard of Review and Preservation of Issue.

Petitioners/Proponents and the Title Board appear to concur regarding the standard of review and preservation of this issue for appeal. Petitioners Bruce and Banta have not addressed this issue in their opening briefs.

B. The Abstract Adopted for the Proposed Initiative Incorporates Predictions of "Economic Impacts" That Are Wholly Speculative and Dependent Upon Presently Unknowable Future Decisions by Lawmakers and Voters.

The portion of the Fiscal Impact Abstract at issue is the following statement under the subheading "Economic Impacts:

> The measure is expected to increase revenue and spending for state and local governments over the long term, shifting a portion of the state's economy from the private sector to the public sector. Government spending for public goods and services, including for example health care, education, social services, infrastructure, and public safety, will increase. Household and business spending or saving will be correspondingly reduced.

Petitioners/Proponents' objection to this portion of the abstract is that it is necessarily grounded in and wholly dependent upon completely unknowable future fiscal policy decisions, to be made by future lawmakers and voters, under presently unknowable circumstances, at multiple levels of government. There is and can be

no "evidence," "testimony," or "information" to support it – *Smith v. Hayes (In re Title, Ballot Title and Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 324 (Colo. 2017) – or, indeed, to challenge it. At this stage, the "estimate" quoted above can only be pure speculation.

The Title Board defends this statement upon three grounds. First, it notes that the complete Initial Fiscal Impact Statement – prepared pursuant to §1-40-105.5(2), C.R.S. (2019) – contains a section entitled "Assumptions" which acknowledges that the effects of the Proposed Initiative are "indeterminate because they depend on subsequent decisions by policy makers." This statement does not appear, however, in the Abstract – prepared pursuant to §1-40-105.5(3), C.R.S. (2019) – and is not part of the information that must appear in a petition section under §§1-40-105.5(4) and 1-40-110(3), C.R.S. (2019), or in the Ballot Information Booklet pursuant to §1-40-124.5(1), C.R.S. (2019).

Second, the Title Board submits that "[b]y statute, the abstract must address these issues." Title Board Op. Br., p. 19. The statute – §1-40-105.5(3)(a)-(d), C.R.S. (2019) – requires "estimates." Under any reasonable interpretation, this would allow for a statement that an estimate is indeterminate. Any other interpretation would mandate the presentation of unsupportable "estimates." That, in turn, would serve absolutely no useful public purpose. "[W]e avoid interpreting

a statute in a way that creates absurd results 'if alternative interpretations consistent with the legislative purpose are available.'" *Burton v. Colorado Access*, 410 P.3d 1255, 1260 (Colo. 2018), quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

Finally, the Title Board submits that an "estimate" – or "assessment of future fiscal impact" in its words – "necessarily includes predictions regarding future fiscal policy decisions." Title Board Op. Br., p. 19. In this case it would involve predictions and overlapping assessments of myriad future fiscal policy decisions over time at the state and every local government ("district") level throughout the state. The simple impracticality of such an exercise suggests its complete absence of any informational value or utility in the context of providing useful information to voters in the ballot initiative process. Again, this is not a reasonable way to interpret §1-40-105.5(3)(a)-(d), C.R.S. (2019).

CONCLUSION

Petitioners/Proponents respectfully renew their request that the Court reverse the actions of the Title Board and direct the Board to set a title, ballot title and submission clause consistent with the requirements of §1-40-106(3)(b), C.R.S. (2019), as proposed by Petitioners/Proponents. Petitioners/Proponents further respectfully renew their request that the Court direct the Title Board to adopt a fair

and accurate statement of Economic Impact in the abstract, as proposed by Petitioners/Proponents.

Respectfully submitted this 8th day of October, 2019.

s/Edward T. Ramey
Edward T. Ramey, #6748
Martha M. Tierney, #27521
Tierney Lawrence LLC
225 East 16th Avenue, Suite 350
Denver, CO 80203
Telephone: 720-242-7585; 720-242-7577
Email: eramey@tierneylawrence.com
mtierney@tierneylawrence.com

ATTORNEYS FOR PETITIONERS/PROPONENTS

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2019, a true and correct copy of the foregoing was filed and served via the Court's E-filing system [or electronic mail and overnight delivery service] upon the following:

Emily B. Buckley, Esq.
Assistant Attorney General
Nicholas W. Katz, Law Student Extern
Public Officials Unit
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Emily.Buckley@coag.gov
Attorneys for Title Board

William M. Banta
10631 East Crestline Avenue
Englewood, CO 80111
billbanta@msn.com

Douglas Bruce
P.O. Box 26018
Colorado Springs, CO 80936
taxcutter@msn.com

s/Edward T. Ramey
Edward T. Ramey