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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2019) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019–2020 #3 ("State Fiscal Policy") **Petitioners:** Douglas Bruce, Steve Briggs, Carol Hedges, and William Banta **v.** **Respondents:** Carol Hedges and Steve Briggs, **and** **Title Board:** Jason Gelender, Melissa Polk, and David Powell.	▲ **COURT USE ONLY** ▲ Case No. 2019SA183
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THE TITLE BOARD'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I 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, I certify that:

A. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 2,616 words.

B. The brief complies with C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b) because for each issue it contains, under a separate heading, a statement of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

/s/ *Emily B. Buckley*

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The Colorado Title Board, by and through undersigned counsel, hereby submits its Answer Brief.

ARGUMENT

I. The title set by the Board is fair, clear, accurate, and complete.

Each set of petitioners argues that Initiative #3's title is unfair and misleading. For the reasons set forth in the Board's Opening Brief and in this Answer Brief,[1] this Court should reject those arguments as insufficient to overcome the deference this Court grants the Board in the setting of titles.

a. The title is clear: Initiative #3 would repeal TABOR.

Banta contends that the title is unclear because it reads, "*concerning* the repeal of . . . TABOR." Banta Op. Br. 11 (emphasis added). He suggests that the use of the word "concerning" means only that the Initiative has "something to do with repeal." *Id.* But Banta acknowledges in the next sentence that "Initiative #3 clearly has

[1] As Douglas Bruce's Opening Brief is substantially the same as his Petition for Review, the Board relies upon its Opening Brief's response to Bruce's arguments. This Answer Brief addresses the arguments raised by William Banta and by Carol Hedges and Steve Briggs in their respective Opening Briefs.

TABOR's future existence in its sights and is intent upon repealing [TABOR]." *Id.* The title reflects that clear intent.

Use of the word "concerning" does not render the title unclear. "Concerning" means "[r]elating to; pertaining to; affecting; involving; being substantially engaged in or taking part in." *Concerning*, Black's Law Dictionary (4th ed. 1968); *see also* The American Heritage Dictionary 305 (2d college ed. 1985) ("In reference to; regarding."). Thus, the title provides that the proposed amendment would repeal TABOR, and Banta suggests no plausible alternative reading. This Court does not demand that the Board draft the best possible title, *In re Title, Ballot Title, & Submission Clause for 2009–2010 #45*, 234 P.3d 642, 648 (Colo. 2010), and use of the word "concerning" does not render the title inaccurate or misleading.

b. The title unambiguously states the principle of the provision to be repealed.

Banta next argues the title violates the statutory requirement of "unambiguously stat[ing] the principle of the provision sought to be . . . repealed." Banta Op. Br. 10; *see* § 1-40-106(3)(b), C.R.S. (2019). Hedges and Briggs make the same argument. Hedges & Briggs Op. Br. 13–14.

Yet these petitioners fundamentally disagree on the measure's principle.

All petitioners recognize that Initiative #3 seeks to repeal Article X, section 20, but none agree on the "principle" of that section. Hedges and Briggs identify the principle as "serv[ing] to constrain the ability of the people—either acting directly or through their elected representatives—to determine fiscal policy." Hedges & Briggs Op. Br. 14. Banta ascribes to section 20 the opposite principle: "Section 20 . . . reserves substantial rights and powers over fiscal policy to Colorado citizens." Banta Op. Br. 8. These disparate descriptions of the measure's purpose highlight the need for the Board's neutrality.

Accordingly, the Board set a title that impartially describes section 20's principle. That "principle" is best reflected in the section's title, which summarizes all that section 20 entails—a "Taxpayer's Bill of Rights." The well-recognized title of section 20 serves to neutrally and unambiguously describe the section's "principle."

That conclusion is supported by this Court's precedent. Although Banta asks that the title list each aspect of TABOR,[2] he failed to identify a single case where this Court invalidated a repeal measure merely because it did not list out the details of the law to be repealed. To the contrary, "[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 the Designation "Pregnancy,"* 757 P.2d 132, 136 (Colo. 1988). This Court previously has affirmed titles providing for the repeal of constitutional amendments where the title did little to state the principle of the provision to be repealed. *See* Title Board's Op. Br. 14–15 (discussing such cases). Here, by referencing "the Taxpayer's Bill of Rights," the Board's title exceeds that minimum

[2] Banta suggests that Initiative #3 presents a special case, "[g]iven the constitutional import" and the potential "surrender of a considerable number of Coloradans' constitutional rights, powers, and policies." Banta Op. Br. 16–17. But TABOR possesses no talismanic qualities that entitle it to special treatment here. If other constitutional provisions can be repealed without the ballot title spelling out their contents, TABOR may suffer the same fate. *Cf. In re Title, Ballot Title, & Submission Clause for 2013–2014 #129*, 333 P.3d 101, 103 (Colo. 2014) (affirming a title for an initiative to amend TABOR, even though the title made no reference to TABOR).

threshold and unambiguously states the principle of Article X, section 20.

c. The title states the true intent and meaning of Initiative #3.

Hedges and Briggs assert that the title fails to "express the true intent and meaning of the proposal." Hedges & Briggs Op. Br. 13–15; *see* § 1-40-106(3)(b), C.R.S. (2019). They say the intended purpose of Initiative #3 is not to repeal TABOR but "to restore the ability of the people—acting directly or through their elected representatives—to determine fiscal policy." Hedges & Briggs Op. Br. 14. They find error in the lack of reference to that purpose in the title, claiming that the Board "confus[ed] the purpose of the Proposed Initiative with its mechanism." *Id.* This argument attempts to create a distinction that does not exist.

In its entirety, Initiative #3 reads: "In the constitution of the state of Colorado, repeal section 20 of article X." Record for Initiative #3, p. 2 (filed Aug. 23, 2019) ("Record"). In interpreting Initiative #3 earlier this year, this Court found the initiative's purpose obvious: "The initiative effectuates one and only one general objective or purpose, namely, the repeal of TABOR." *In re Title, Ballot Title, & Submission Clause for*

2019–2020 #3, 442 P.3d 867, 870 (Colo. 2019). Thus, Initiative #3's purpose has always been to repeal TABOR, and the title plainly reflects that purpose.

Hedges and Briggs' appeal to caselaw to support their novel distinction misses the mark. In *In re Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative on "Obscenity,"* this Court found a title misleading where the initiative was intended to foreclose Colorado courts from expanding constitutional protection of obscenity but the title "likely would appear to most voters to represent an expansion of the right." 877 P.2d 848, 850–51 (Colo. 1994). Additionally, the Court noted that "the Board omitted language from the title and submission clause which all the parties agreed was an accurate statement of the intent and purpose of the initiative." *Id.* at 850 n.2.

Not so here. Here, the parties do not agree that Hedges and Briggs' proposed statement of purpose is accurate. In contrast, if the parties agree on anything, it is solely that—as the title reflects—Initiative #3 intends to repeal TABOR. And unlike in *In re "Obscenity,"* the title here does not present any risk of confusing voters as to the

purpose of Initiative #3. *See In re* #3, 442 P.3d at 870 ("Nor can we see how Initiative #3 could be read so as to pose a risk of surprise or fraud on voters."). However Initiative #3's purpose is framed—whether restoration of taxpayer rights or restriction of those rights—its "true intent and meaning" is a repeal of TABOR.

Thus, because the title is fair and complete, unambiguously states the principle of the provision to be repealed, and states the true intent and meaning of the proposed initiative, this Court should affirm the title.

II. The title does not contain an impermissible catch phrase.

Hedges and Briggs next take issue with the Board's reference to the title of Article X, section 20, the "Taxpayer's Bill of Rights, (TABOR)." Because the phrase "Bill of Rights" has a positive connotation—who wants to give up rights?—Hedges and Briggs fear that the phrase's inclusion in the title will negatively impact the initiative's likelihood of success. But that does not make the phrase an impermissible catch phrase.

To start, Hedges and Briggs' reliance on *In re Title, Ballot Title, & Submission Clause, & Summary for 1999–2000 #258(A)*, 4 P.3d 1094

(Colo. 2000), is misplaced. There, the Court made clear that catch phrases are "brief striking phrases for use in advertising or promotion" that "appeal to emotion" rather than "contributing to voter understanding." *Id.* at 1100. The prohibition, does not, however, include terms that "are merely descriptive of the proposal." *Id.* The challenged phrase here is the section heading included in the Colorado Constitution. Referring to the constitutional provision sought to be repealed is descriptive of the purpose of Initiative #3 and contributes to voters' understanding of the impact of their vote.[3]

Moreover, even if the phrase was used in advertising, that fact would not require reversal. "The purpose of the catch-phrase prohibition is to prevent prejudice and voter confusion, not to forbid the use of language that proponents of the initiative might also use in their campaigns." *In re #45*, 234 P.3d at 650 (citation omitted). Hedges and Briggs have failed to satisfy their burden of presenting "convincing evidence" that use of the challenged phrase will lead to voter confusion.

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[3] *See Hearing Before Title Board on Proposed Initiative 2019–2020 #3* (July 17, 2019), available at https://tinyurl.com/y6enzlxn (statements of Board members Melissa Polk at 1:42:50–1:44:15 and David Powell at 2:30:27–2:32:15).

See In re Title, Ballot Title, & Submission Clause, & Summary for 1999–2000 #227 & #228, 3 P.3d 1, 7 (Colo. 2000).

Hedges and Briggs also fail to prove that use of the constitutional title would mislead voters. They argue that referring to section 20 as "the Taxpayer's Bill of Rights" is misleading because "[t]hese are not universal rights for all taxpayers, but rather a complex collection of policy requirements and limitations that some taxpayers might favor, but other may not." Hedges & Briggs Op. Br. 12. That argument is based on the faulty premise that a right is not a right if not all right-holders support it. *See id.* at 10–11 (arguing that TABOR's voter approval requirements are not "a new universal right for all taxpayers" because some "voters may oppose the restrictions"). But a right to vote on all tax increases is still a right, even if not all right-holders want that right.

Hedges and Briggs continue that argument by trying to frame TABOR requirements as restrictions on government rather than rights for taxpayers. *Id.* at 9–12 (describing "a complex collection of policy requirements and limitations"). Each of the TABOR provisions reviewed can be depicted as either a restriction on government or a right for the

citizen—that is the nature of rights. When the government owes a duty to its citizens to do something or abstain from doing something, the citizens have a corresponding right against the government. Hedges and Briggs acknowledge that TABOR "is a compendium of requirements, restrictions, prohibitions, and limitations." *Id.* at 8. Accordingly, it is not misleading to describe it as a "Bill of Rights."

It is, however, misleading to dismiss the challenged phrase as "no more than a slogan." *See id.* The phrase is more than a slogan—it is the title to a section of the Colorado Constitution. Hedges and Briggs acknowledge this but try to dismiss it as irrelevant, citing *In re #258(A)*, 4. P.3d at 1100, for support. But that case dealt with the inclusion in a title of language from the *proposed initiative*; the Court concluded that the Board could not include such language if it constituted a catch phrase. *Id.* Here, the issue is not language from the initiative but language from the constitutional provision sought to be repealed. That presents a much different case, and *In re #258(A)* does not support striking such language.

In sum, the Board properly exercised its drafting authority. The title makes clear that Initiative #3 will repeal the Taxpayer's Bill of

Rights, Article X, section 20, of the Colorado Constitution.[4] Using the title of the constitutional provision at issue will contribute to voter understanding and assist the electorate in deciding whether to support the measure.

III. The fiscal impact abstract is not misleading.

Hedges and Briggs' final argument is that the fiscal impact abstract is unfair and misleading because it incorporates economic predictions that Hedges and Briggs dismiss as "pure speculation." Hedges & Briggs Op. Br. 18. This Court should reject that argument because the abstract adheres to statutory requirements and is not misleading.

As an initial matter, Hedges and Briggs quote an earlier version of the fiscal impact abstract—the initial abstract rather than the abstract as modified by the Board. *See* Hedges & Briggs Op. Br. 17–18; *compare* Record, p. 21 (original abstract), *with* Record, p. 22 (modified abstract). The Board modified the abstract on rehearing on August 21, 2019 to

[4] Hedges and Briggs also argue that the title is "backwards" because it suggests that Initiative #3 seeks to repeal the constitutional title and not the substantive section. Hedges & Briggs Op. Br. 12–13. This is not a reasonable reading of the title. The title makes no suggestion that only the constitutional title would be repealed.

reflect the indeterminacy that Hedges and Briggs identify.[5] Title Bd.'s Op. Br. 18–19. Specifically, in response to Hedges and Briggs' motion for rehearing, the Board modified and combined the second and third sentences of the economic impact section:

> If government spending for public goods and services, including for example health care, education, social services, infrastructure, and public safety, increases, as expected, household and business spending or saving will be correspondingly reduced.

Id. Hedges and Briggs' Opening Brief fails to acknowledge this change.

In light of that change, the economic impact section sets out Initiative #3's "expected" impact on government revenue and spending and explains the economic impact expected to result. This information is mandated by statute: "The abstract must include . . . [a]n estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted . . . ." § 1-40-105.5(3)(a), C.R.S. (2019).

In response, Hedges and Briggs assert that the abstract is not an "estimate" because it does not contain "evidence, testimony, or

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[5] *See Hearing Before Title Board on Proposed Initiative 2019–2020 #3* (August 21, 2019), available at https://tinyurl.com/y6enzlxn (statements and vote of Board members at 27:10–28:23).

information." Hedges & Briggs Op. Br. 18 (quotations omitted). This Court rejected identical arguments in *In re Title, Ballot Title, & Submission Clause for 2017–2018 #4*, 395 P.3d 318 (Colo. 2017). Where the legislative council cannot provide quantitative estimates, "indeterminate qualitative impact statements" are permissible. *Id.* at 324–35.

By Hedges and Briggs' logic, the legislative council should never provide an economic impact estimate, as such *estimate*—by definition—will be "grounded in" and "dependent upon" predictions of future policy decisions. *See* Hedges & Briggs Op. Br. 18. But just because the legislative council cannot read the future does not mean that it cannot abide by the governing statute and estimate future economic impact. *See* § 1-40-105.5(3)(a).

Simply put, Hedges and Briggs fear that the abstract "will be used by opponents of the Proposed Initiative." Hedges & Briggs Op. Br. 19. That fear does not warrant rewriting the abstract. Because the abstract is not insufficient, unfair, or misleading, this Court should affirm the Board's approval of the abstract.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's actions in setting the title for Initiative #3 and approving the fiscal impact abstract.

Respectfully submitted this 8th day of October, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCEF and/or via U.S. Postal Service, at Denver, Colorado, this 8th day of October, 2019, addressed as follows:

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