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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[1]	**▲ COURT USE ONLY ▲**
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OPENING BRIEF OF PETITIONERS/PROPONENTS CAROL HEDGES AND STEVE BRIGGS

[1] The members of the Ballot Title Board for these proceedings on remand of Proposed Initiative 2019-2020 #3 differ from the Board members in the initial proceedings – Supreme Court Case No. 2019SA25 – and identified in the Court's Amended Briefing Order in this case.

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 4,332 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*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other

Petitioners/Proponents Carol Hedges and Steve Briggs, through counsel, respectfully submit their Opening Brief:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Title Board err in setting a title for Proposed Initiative 2019-2020 #3 ("the Proposed Initiative") that uses a prohibited catch phrase that is misleading and that violates applicable statutory standards by failing to state either the purpose of the Proposed Initiative or the principle of the provision sought to be repealed?

2. Did the Title Board err in adopting a fiscal impact abstract incorporating predictions of "Economic impacts" that are wholly speculative about future decisions elected representatives and voters might make in myriad local and state governmental districts?

STATEMENT OF THE CASE

Petitioners Carol Hedges and Steve Briggs are the designated representatives of the proponents of the Proposed Initiative. These Petitioners/Proponents submitted the Proposed Initiative to the Title Board for the setting of a title, ballot title and submission clause pursuant to §1-40-106, C.R.S. (2019), on January 4, 2019.

The Title Board held a hearing on January 16, 2019, and determined the Proposed Initiative contained more than a single subject as required by Colo. Const. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2019), and, therefore, denied the setting of a title for lack of jurisdiction. A rehearing was conducted on February 6, 2019, at which time the Title Board denied Petitioners/Proponents' Motion for Rehearing on the single-subject issue, and determined that the Board therefore did not have jurisdiction to consider their objections to the fiscal impact abstract for the Proposed Initiative prepared by the Director of Research of the Legislative Council of the General Assembly.

Petitioners/Proponents filed a Petition for Review with this Court pursuant to §1-40-107(2), C.R.S. (2019), on February 13, 2019 (Case No. 2019SA25). On June 17, 2019, this Court issued its Opinion (2019 CO 57) reversing the action of the Title Board as to whether the Proposed Initiative contained a single subject. The Court directed that the Proposed Initiative be returned to the Title Board for the setting of a title, ballot title and submission clause.

Upon remand, the Title Board conducted a hearing on July 17, 2019, at which time it approved the single subject and set a title, ballot title and submission clause for the Proposed Initiative. Three Motions for Rehearing were timely filed, including one by the Petitioners/Proponents. A rehearing was held on August 21,

2019, at which time the Board denied all the rehearing requests directed to the title. The Board also partially granted and denied Petitioners/Proponents' substantive objection to the fiscal abstract and adopted the abstract with revisions. Petitioners/Proponents timely filed their Petition for Review with this Court on August 28, 2019, pursuant to §1-40-107(2), C.R.S. (2019).

SUMMARY OF THE ARGUMENT

1. The title, ballot title and submission clause. The Title Board set the following title for 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.

While commendable for its brevity, this title adopts and highlights an impermissible catch phrase – "Taxpayer's Bill of Rights." The politically charged phrase is lifted from the internal section heading grafted into Colo. Const. art. X, §20 by its own drafter(s). The phrase – emotionally laden and inaccurately suggestive of a wholly inapt historical parallel – is prejudicial to a fair consideration by the voters of the current proposal to repeal Colo. Const. art. X, §20.

As important, the phrase "Taxpayer's Bill of Rights" is descriptively inaccurate and misleading as to the content of Colo. Const. art. X, §20. Colo.

Const. art. X, §20 does not confer "rights" upon "taxpayers," but rather imposes a complex assortment of restrictions, requirements, prohibitions, and limitations upon the ability of the people – directly and through their elected representatives – to determine fiscal policy at the state and local levels.

In addition, statutory standards require that the title state the principle of the provision sought to be repealed and the true and intent and meaning of the proposal. The obvious principle of the provision to be repealed is to constrain the ability of the people, acting directly and through their elected representatives, to determine fiscal policy. The intended purpose of the Proposed Initiative – obscured by the title – is to remove those requirements, restrictions, prohibitions, and limitations upon the ability of the people, acting directly and through their elected representatives, to determine fiscal policy.

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." Such a prediction of "economic impacts" of unknowable future fiscal policies that may or may not be adopted by myriad state and local governmental districts is pure speculation. 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.

The Title Board is vested with considerable discretion in setting the title and ballot title and submission clause. *Bentley v. Mason (In re Title, Ballot Title and Submission Clause for 2015-2016 #63),* 370 P.3d 628, 634 (Colo. 2016); *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #85),* 328 P.3d 136, 141 (Colo. 2014). The Court will reverse the Title Board's decision, however, if a title is "insufficient, unfair, or misleading." *Id*.; see also *Hayes v. Spalding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)*, 369 P.3d 565, 569 (Colo. 2016) ("[O]ur role is to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.")

This issue was preserved. Please see section I of the Motion for Rehearing submitted by the Petitioners/Proponents.

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.

Catch phrases are prohibited in titles, for good reason. In their usual context, "[c]atch phrases are terms that work in favor of a proposal without contributing to voter understanding; they trigger a favorable response to the proposal based not on its content but on its wording." *Bentley v. Mason (In re Title, Ballot Title and Submission Clause for 2015-2016 #63), supra*. "By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content itself, but merely on the wording of the catch phrase." *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 649 (Colo. 2010), quoting *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).

In the present case, the situation is reversed. The emotional and misleading catch phrase – "Taxpayer's Bill of Rights" – is drawn from a non-substantive section heading that was included within Colo. Const. art. X, §20 by its own proponents. The prejudicial effect is against – rather than in favor of – the Proposed Initiative, which seeks to repeal Colo. Const. art. X, §20. The phrase is not surprisingly supported by the opponents of the Proposed Initiative.

The drafters of Colo. Const. art. X, §20 were of course free to include whatever politically charged and emotionally appealing language they wished within the text or headings of their measure. This does not, however, make repetition of such language permissible in a ballot title. *Garcia*, 4 P.3d at 1100 ("While we agree that the initiative contains this language, the Title Board is not free to include this wording in the titles if, as here, it constitutes a catch phrase"). Notably and appropriately, the "Taxpayer's Bill of Rights" section heading was not included in the ballot title for Colo. Const. art. X, §20 itself in 1992. An Analysis of 1992 Ballot Proposals, Research Pub. No. 369 (1992), Leg. Council of the Colorado General Assembly ("Blue Book"), p. 5 – https://www.cde.state.co.us/stateinfo/qgbluebook

"Taxpayer's Bill of Rights" is no less a catch phrase today than it would have been in 1992 (albeit negatively prejudicing a proposed repeal rather than positively influencing a proposed adoption). It is emotionally laden and divorced from the substance of the measure sought to be repealed. It implies that taxpayers would be surrendering their "rights" – indeed an entire "bill of rights" – should the Proposed Initiative succeed. The phrase is emotionally suggestive of comparisons to our federal Bill of Rights. It implies that Colo. Const. art. X, §20, contains fundamental rights, protecting all "taxpayers" from undue government intrusion.

(Even the use of the word "taxpayers" is an emotionally laden substitute for the people impacted by its provisions.) While to be anticipated in a political sound bite, these words, which are no more than a slogan, are sufficiently prejudicial and distracting from consideration of the merits of the measure itself to be impermissible in a ballot title. *See Garcia*, *supra,* at 1100 ("Catch phrases may also form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment, thus further prejudicing voter understanding of the issues actually presented.")

Equally important, the phrase is not just a catch phrase. It is misleading as to the contents of the proposal sought to be repealed.

Colo. Const. art. X, §20 is a compendium of requirements, restrictions, prohibitions, and limitations upon the ability of the people – both directly and through their elected representatives – to determine fiscal policy, locally and statewide. All of this is overlain with the interpretive mandate "to reasonably restrain most the growth of government" – Colo. Const. art. X, §20(1) – not to provide or protect "rights" for all "taxpayers" (any number of whom may favor different levels and options for providing tax support for particular state or local government services).

Under Colo. Const. art. X, §20(8), for example, new or increased transfer tax rates on real property are prohibited, no new state real property tax or local district income tax can be imposed, and all taxable net income must be taxed at one rate – a requirement likely favored by some taxpayers and disfavored by others. These are absolute prohibitions – taking away policy options and rights. They override the power of the people, acting either directly or through their elected representatives, to determine and benefit from such policies. Suggesting that the Proposed Initiative would repeal taxpayer "rights," when it instead would repeal direct prohibitions upon taxpayer rights, is manifestly misleading. See *Matter of Election Reform Amendment*, 852 P.2d 28, 34-35 (Colo. 1993) ("Because the proposal would flatly prohibit, and not merely limit, utility service discounts, the titles as formulated by the Board do not correctly and fairly express the true intent and meaning of the proposed measure. Instead, the fact that the proposed amendment would prohibit certain contributions must be reflected by the titles for them to express the true intent of the measure.").

Another subsection, Colo. Const. art. X, §20(4), mandates prior voter approval – *i.e.*, expensive taxpayer-funded elections – for any new tax, tax rate or mill levy increase, valuation for assessment ratio increase, extension of an expiring tax, or any tax policy change directly causing a net tax revenue gain to the state or

any local district. The same mandate applies to creation of multiple-fiscal year debt or other financial obligations without irrevocably pledged cash reserves on hand to cover all future payments. What the provision does is automatically trigger an additional barrier to setting fiscal policy by requiring a taxpayer-funded election, and resulting attendant costly campaigns, in each such case. The result is to disrupt the ability of voters (including taxpayers) to act through their elected representatives without that expense and to constrain policy options (if only to avoid automatic elections). Even without this requirement, voters already have the right directly to decide tax policy with an election through the initiative process. The Proposed Initiative would simply repeal and remove these automatic and disruptive impediments.

Some voters, because they may be suspicious of or unhappy with their elected representatives or even opposed to a representative democracy, may support such restrictions on the ability of elected representatives to determine fiscal policy. Some may want to limit the revenues available to government to the greatest extent possible, no matter the funding need. Other voters, because they support the original concept of a representative democracy, may oppose such restrictions on the ability of their elected representatives to determine fiscal policy. Still other voters may oppose the restrictions as unnecessary and costly. Required

voter approval as specified in subsection (4) is thus not a new universal right for all taxpayers. It is a restriction on the ability of the people to act through their elected representatives to determine fiscal policy, a requirement that some taxpayers may support, but others may oppose.

Yet another subsection, Colo. Const. art X, §20(7), is a limitation on the ability of state and local districts to use revenue already on hand. It mandates refunds (or more elections) of any revenues exceeding an arbitrary formula of population growth plus inflation. The formula measures inflation by a consumer price index that does not reflect the actual increase in costs of government services such as education, transportation, and health care. The refund is required, even if the funds could be used for purposes that the majority of taxpayers would support without a costly election. The funds cannot even be placed in a reserve, for use in worsening economic times. It is, in effect, not a "right," or even a limitation upon taxes in the first instance, but, rather, a policy designed to limit the "growth of government" (and the services it can provide) at all levels.

The remaining provisions in Article X, Section 20, are an amalgamation of requirements and limitations on the ability of the people through their elected representatives to determine the source and amount of revenue and expenses. Examples of these restrictive policies include specifying who recovers attorney

fees in a lawsuit to enforce its many provisions; dictating how a ballot title for mandated elections has to be written; requiring a 2/3 vote of each house to declare an emergency and impose a temporary emergency tax; requiring separate recorded roll call votes; requiring specified emergency reserves; and prohibiting emergency property taxes. These are not universal rights for all taxpayers, but rather a complex collection of policy requirements and limitations that some taxpayers might favor, but others may not.

Of the two phrases included in the present titles, the acronym "TABOR" is actually the more commonly known identifying phrase. It is at least less misleading, and less prejudicial to supporters of the Proposed Initiative, than the entire catch phrase "Taxpayer's Bill of Rights." If the Court were to permit a catch phrase to be included in the titles, Petitioners/Proponents respectfully submit that it should be limited to "TABOR."

Finally, the titles set by the Title Board are backwards. The titles state that the Proposed Initiative concerns "the repeal of the Taxpayer's Bill of Rights (TABOR), Article X, Section 20, of the Colorado constitution." "Taxpayer's Bill of Rights" is simply the heading that the proponents chose to insert in their initiative. The proponents of the Proposed Initiative seek to repeal Const. art. X, §20 – not its heading. It would be more accurate, albeit still improperly

prejudicial, to title the measure: "An amendment to the Colorado constitution concerning the repeal of Article X, §20, of the Colorado constitution, which its drafters entitled 'Taxpayer's Bill of Rights' (TABOR)."

The difficulty in setting a title for the repeal of Colo. Const. art. X, §20, is the result of the drafting choices made by its proponents. The standards for setting a title nevertheless require that the title not include "catch phrases" or be misleading. Those standards are not met with the title set in this case.

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: 1) The title shall unambiguously state the principle of the provision sought to be added, amended, or repealed; and 2) 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). ("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.")

The principle of Colo. Const. art. X, §20, is obvious in all its requirements, restrictions, prohibitions, and limitations: all serve to constrain the ability of the people – either acting directly or through their elected representatives – to determine fiscal policy. The intended purpose of the Proposed Initiative is equally clear: to restore the ability of the people – acting directly or through their elected representatives – to determine fiscal policy. To be more specific: to determine the source and amount of public revenues and expenditures.

The Proposed Initiative is not about what fiscal policy should be, but about how fiscal policy should be determined in our representative democracy. It is about restoring the role of our elected representatives in the process of formulating fiscal policy. It is about restoring the very structure of our representative democracy.

The Title Board's error may derive from the majority confusing the purpose of the Proposed Initiative with its mechanism. The repeal of Colo. Const. art. X, §20 is not the *purpose* of the Proposed Initiative. It is the *mechanism* for achieving that purpose. The Board may have concluded that repetition of the heading of the provision sought to be repealed in the title of the Proposed Initiative was sufficient to state the true intent and meaning of the initiative. If so, the Title Board was in error. *See In re Proposed Initiative on "Obscenity*," 877 P.2d 848, 850 (Colo.

1994) ("While it is true that the title and submission clause read, virtually word for word, the same as the Initiative, this fact does not establish that the title and submission clause fairly and accurately set forth the major tenets of the Initiative"). In short, as a matter of statutory requirement, the true intent and meaning – the intended purpose – must be stated in the title. *See, e.g., Cordero*, 328 P.3d at 144 ("The title 'shall correctly and fairly express the true intent and meaning' of the initiative.")

Petitioners respectfully submit that the title should therefore read: "An amendment to the Colorado constitution restoring the ability of the people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures, by repealing Article X, Section 20 of the Colorado constitution." In the alternative, it should read: "An amendment to the Colorado constitution restoring the ability of the people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures, by repealing the requirements, restrictions, prohibitions, and limitations on that ability in Article X, Section 20, of the Colorado constitution."

If the Court should determine that use of a catch phrase in the title should be permitted, the title could be limited to the acronym, "TABOR", and read as follows: "An amendment to the Colorado constitution restoring the ability of the

people, directly and through their elected representatives, to determine the source and amount of public revenues and expenditures, by repealing Article X, Section 20 of the Colorado constitution, commonly known as TABOR."

In sum, a title must be set that is not insufficient, unfair, or misleading. The title set by the Title Board is unfair and misleading in using a catch phrase, made worse because the catch phrase misrepresents the content of the measure sought to be repealed – Colo. Const. art. X, §20. It is insufficient in failing to state the principle of the provision sought to be repealed or the intended purpose of the Proposed Initiative. It is in total unfair to Colorado voters.

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.

Section 1-40-105.5(3), C.R.S. (2019), states that the fiscal impact abstract must include, *inter alia*:

> **(a)** An estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted;
> **(b)** A statement of the measure's economic benefits for all Coloradans;
> **(c)** An estimate of the amount of any state and local government recurring expenditures or fiscal liabilities if the measure is enacted;

> **(d)** For any initiated measure that modifies the state tax laws, an estimate, if feasible, of the impact to the average taxpayer if the measure is enacted; . . .

When reviewing the abstract pursuant to its authority under §1-40-107(2), C.R.S. (2019), this Court applies "the same standard we apply to the Title Board's single-subject and clear-title findings: we draw all legitimate presumptions in favor of the propriety of the Title Board's decision and only overturn the Board's decision in a clear case." *Smith v. Hayes (In re Title, Ballot Title and Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 323 (Colo. 2017). Thus, applying the same standard as in setting a title, the Court must reverse a statement of economic impact that in insufficient, unfair, or misleading. *Bentley v. Mason, supra; Cordero v. Leahy, supra.*

This issue was preserved. Please see section II of the Motion for Rehearing submitted by the Petitioners/Proponents.

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 fiscal abstract approved by the Title Board contains the following statement regarding "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, even in such generalized form, it is necessarily grounded in and wholly dependent upon completely unknowable future fiscal policy decisions – decisions to be made by future lawmakers and voters, under presently unknowable circumstances, at multiple governmental levels. Indeed, both the decisions and fiscal impacts could vary significantly and independently between and among districts, and in any number of cases may have very different net results. While the Proposed Initiative may expand options and alter the decision-making processes, it says absolutely nothing about what the substance of future fiscal policy decisions should be.

The abstract as adopted by the Title Board does not really present an "estimate" at all – as required by §1-40-105.5(3), C.R.S. (2019) – nor is it supportable (or subject to challenge) by any form of "evidence," "testimony," or "information," in the manner cited by this Court in *Smith, supra*. Predictions of future policy decisions at all levels of government, the interplay of such decisions, and the possible net economic impacts of those decisions, at this stage are – and can only be – pure speculation.

At the rehearing, a member of the Legislative Council Staff defended the statement on the basis that in local jurisdictions where mill levies are currently reduced to accommodate the revenue limit or to issue refunds pursuant to Colo. Const. art. X, §20(7), property taxes may be expected to increase to varying extents. That explanation is also contained in the "Economic Impact" section of the "Initial Fiscal Impact Statement." The Initial Fiscal Impact Statement, however, also notes: "The specific effects of this change will depend on decisions made by governments in the future."

Such a minor and technical point included in the initial draft of the Fiscal Impact Statement" should not be the basis for including an "estimate" in the abstract that is misleading and unfair. The statement will used by opponents of the Proposed Initiative to argue that even the Legislative Council Staff has recognized that the proposal will lead to "runaway" spending. Petitioners respectfully submit that the statement of Economic Impact in the abstract should be revised to read:

> The specific impact of this change will depend on decisions made in the future. Only in local districts where mill levies are currently reduced, as necessary to accommodate the revenue limit or to issue refunds, might property taxes increase in varying extents. In all other state and local districts, it is unknown whether or how revenue and spending would change over the long term.

In sum, the statement of Economic Impact in the abstract is insufficient, unfair, and misleading. A statement in the nature suggested would accurately and fairly reflect the knowable impacts of passage of the Proposed Initiative.

CONCLUSION

Petitioners/Proponents respectfully request the Court to 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 request the Court to 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 18 day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 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:

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