BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Lori Hvizda Ward and Lynn Kutner,
Objectors,

v.

Linda White and Rich Guggenheim,
Designated Representatives of Initiative 2023-2024 #104.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #104

Through their legal counsel, Lori Hvizda Ward and Lynn Kutner, registered electors of Larimer and Denver Counties, respectively, hereby file this motion for rehearing on Initiative 2023-2024 #104.

On January 3, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #104:

> *Shall there be a change to the Colorado Revised Statutes concerning restricting participation in athletic programs based on biological sex at birth, and, in connection therewith, defining a public athletics provider for minors as a public school, a public school district, an activities association or organization involving a public school, and a private school when competing with a public school; requiring public athletics providers for minors to designate each athletics program for students of elementary, middle, and high school as female, male, or coeducational and only allowing students who are female based on biological sex at birth to participate in athletic programs designated as female; prohibiting any governmental entity from investigating, reviewing or taking adverse action against a public athletics provider for minors for compliance with this provision; establishing a cause of action for a public athletics provider for minors or a student who suffers harm as a result of noncompliance of this provision; requiring the department of education to assume financial responsibility for any expense related to a lawsuit or complaint for compliance with this provision; and allowing governmental liability for a civil action brought for noncompliance with this provision?*

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

I. The Board lacked jurisdiction due to #104's single subject violations.

There are two types of single subject violations at issue here that are coupled with the limit on participation in athletic activities in schools.

A. Changes to an array of existing governmental powers

The measure prohibits every government entity at all levels from taking or doing anything about a complaint pertaining to public athletics providers. No court, no agency, no district, and no legislative committee could inquire about the propriety of the official action taken with regard to participation in sports-related activities. This limitation on an historic, appropriate field of government powers is inconsistent with the single subject requirement and not likely to be a known or intended result of voters. C.R.S. § 1-40-106.5(1)(e)(II) (single subject requirement guards against voter surprise).

B. Confusing drafting

The provision restricting government powers is so confusingly written as to be internally contradictory. What it does say is this: "A governmental entity shall not entertain a complaint [or take related actions] against [potential defendants] **for compliance** with this subsection (2)." (Emphasis added.)

In other words, this provision prohibits actions filed in order to obtain compliance with the stated limits on participation. While proponents will undoubtedly state they intended to prohibit complaints against defendants who have complied with subsection (2), they wrote it to have the opposite effect. "The preposition 'for' means 'in order to bring about or further,' or 'in order to obtain.'" *Norton v. Rocky Mt. Planned Parenthood, Inc*., 2018 CO 3, ¶12 (citing For, Webster's Third New Int'l Dictionary (unabr. ed. 2002) (interpreting limit on State use of public funds to pay "for" the performance of any abortion); *see* Merriam-Webster Online Dictionary ("for" is "a function word to indicate purpose" or "an intended goal"), https://www.merriam-webster.com/dictionary/for (last viewed Jan. 9, 2024). Using these definitions, the above cited provision of Initiative #104 effectively reads, "A governmental entity shall not entertain a complaint [or take related actions] against [potential defendants] **in order to bring about (or to obtain) compliance** with this subsection (2)." (Emphasis added.)

If Proponents intended to prohibit such complaints that are initiated "as a result of compliance" with the provisions, they would have said so. That language would make it clear that the complaints which could never be brought were those that dealt with decisions to disqualify athletes. Notably, they used exactly that terminology in Proposed Section 22-32-116.6(4). There, they referred to the Department of Education's responsibility for costs whenever legal actions were brought "as a result of compliance with subsection (2) of this section." Given the "rule of consistent usage," wherein the same term used in the same statute is deemed to have the same meaning, "for compliance" and "as a result of compliance" are not equivalent phrases. *See Colorado Common Cause v. Meyer*, 758 P.2d 153, 161 (Colo. 1988).

Thus, Proponents drafted a provision that prohibits complaints being brought "in order to" bring about "compliance" with its key provision. Colo. Const., art. V, sec. 1(5.5) (the single subject of a measure "shall be clearly expressed in its title"). A clear single subject statement cannot be written when the measure's express terms conflict with what proponents now say they intended to achieve. After all, the Board's titles cannot just reflect the proponents' intent; titles must also reflect a proposed law's "true" meaning. C.R.S. § 1-40-105(3)(b).

C. Intramural contests are a non-competitive, unrelated class of endeavors 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(1)(c).

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 further confuse #104's restrictions on filing complaints "for compliance" with the new limitations on participation in athletics.

For the reasons set forth in Section I.B above, a title is inherently confusing if it leaves voters with the impression that complaints and governmental action cannot be taken "for

compliance with" these restrictions. Therefore, the measure itself makes accurate title setting impossible. *In re Title, Ballot Title & Submission Clause for Initiative 2015-2016 #156*, 2016 CO 56, ¶¶13, 15 (title was "illogical and inherently confusing" because language from the measure, incorporated into the title, was "muddled" and did "not help voters understand the effect of a 'yes' or 'no' vote"). A title is legally insufficient where the title language used, even if taken directly from the measure itself, "makes no sense." *Id.* at ¶14. That is the case here.

B. The titles incorrectly state the Colorado Department of Education will be responsible for any expense related to a lawsuit or complaint "for compliance" with this provision.

The titles state the Department of Education must pay the expense of lawsuits or complaints undertaken "for compliance" with the measure's restrictions. Consistent with the above discussion of the meaning of "for", the titles will communicate to voters that this responsibility applies to actions to "obtain" compliance. But that's not what the text seeks to achieve. #104 imposes a financial burden on the Department where expenses are incurred "**as a result of** compliance with subsection (2) of this section." Proposed Section 22-32-116.6(4) (emphasis added). In other words, the measure requires the Department to pay the costs where a party has already complied, not where a party is sued in order to make it comply. This title is misleading for this reason as well.

C. 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, or physical" harm suffered. Proposed Section 22-32-116.6(3)(d). A voter would not ordinarily think that a group sponsoring athletic activities could suffer, much less sue for, harms that are this broadly categorized. Proposed Section 22-32-116.6(3)(c). But they should know, by means of the title, that this measure generates exceedingly broad, potential liability.

D. 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), (c). 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.

E. The titles fail to state that this initiative allows parties suing under its provisions to obtain "injunctive relief, monetary damages, 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).

F. 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.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #104 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 10th day of January, 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 #104 was sent this day, January 10, 2024, via first-class mail, postage paid and via fax to:

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