BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Norma B. Akright,
Objector,

v.

Michele Haedrich and Steven Ward,
Proponents of Initiative 2023-2024 #283.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #283

Through legal counsel, Norma B. Akright, registered elector of Montrose County, hereby files this motion for rehearing on Initiative 2023-2024 #283.

On April 17, 2024, the Title Setting Board erred in setting the following ballot title and submission clause for Initiative 2023-2024 #283:

> *Shall there be an amendment to the Colorado constitution limiting new or increased fees, and, in connection therewith, specifying the requirements that such a fee must satisfy to be a "fee" for purposes of the Taxpayer's Bill of Rights (TABOR) by allowing such a fee to be imposed only in an amount that reasonably approximates the payor's fair share of costs incurred by government in conferring a specific benefit to the payor and requiring such a fee to be voluntarily paid in exchange for the specific benefit?*

I. The Title Board lacked jurisdiction to set titles.

A. This initiative contains multiple subjects.

The initiative covertly converts certain fees into taxes. Voters will not know about this surreptitious change that will require such fees or increases in fees to be approved by voters as if they were taxes.

1. *Initiative #283 excludes from "fee" any charges that are paid by third parties, which is written to confuse voters about the reach of this measure.*

Under this measure, a charge qualifies as a "fee" only if: (1) the fee-payer is the user of the government service; and (2) if the charge imposed is "in exchange for specific benefit conferred on the payer."

When a parent pays his university student's athletic fee so the student can attend intercollegiate athletic contests, the payer is the parent but receives no "specific benefit" from the fee payment. When a friend pays a rec center fee for her roommate so the roommate can use the rec center for a day, the payer is the friend but that person receives no "specific benefit" from the fee payment. When a spouse pays her husband's specialty license plate fee, the payer is the spouse but that person receives no "specific benefit" from the fee payment. For that matter, an insurance company that pays a charge into workers comp-related funds or an oil company that pays a charge into the Petroleum Storage Tank Fund do not, by that fact alone, provide a "specific benefit" attributable to payers for their payments. *See Barber v. Ritter*, 196 P.3d 238, 243 (Colo. 2008).

Initiative #283 surreptitiously makes the identity of the payer, not the function or purpose or actual use of the imposition, the key test in determining what will and what will not qualify as a "fee." What is a fee for one person (if that is the person who pays) is not a fee for another (if that is a person where a third party pays).

Further, because a fee under #283 must be calibrated to reflect "the payer's fair share of the costs incurred by the government in providing said specific benefit" and in many instances there is no "specific benefit" that runs to the payer, the reasonable relationship element of the fee definition would never apply to third party fee payers. Thus, because neither element of the fee definition would be satisfied in such cases, an imposition will never be treated as a fee whenever the payer of the fee is not also the party receiving the government good or service.

As #283 is drafted, then, voters will unknowingly require fees to be subject to TABOR's voter approval requirement for new taxes and tax increases, depending on the identity of the payer. Colo. Const., art. X, sec. 20(4)(a). As Proponents admitted at the Title Board hearing, the non-fee payments will also affect what is counted toward a government's TABOR caps. Thus, there will be a two-fold surprise for voters who think they are adopting a simple definition that is equally applicable to all fees. And those surprises are single subject violations that need to be remedied by the Title Board by refusing to set titles for this initiative.

2. Initiative #283 also prohibits, without admitting it does so, regulatory charges that confer no "specific benefit" upon the fee payers.

As a general matter, certain fees are imposed pursuant to government's police power and thus serve a regulatory purpose. An imposition is a regulatory charge if it is "imposed as part of a comprehensive regulatory scheme, and if the primary purpose of the charge is to defray the reasonable direct and indirect costs of providing a service or regulating an activity under that scheme." *Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶26 ("*CUT Found.*"). In such instances, benefits stemming from the regulatory program "are shared by citizens and visitors who never pay the charge because they never use" the service provided. *Id*., ¶30.

In contrast to what is known as a proprietary fee where there is a payment exchanged for a specific service, *see, e.g., Perl-Mack Enterprises Co. v. Denver*, 568 P.2d 468, 472 (Colo. 1972), a "regulatory charge" involves no such transaction between government and a recipient of a service. Aspen's bag charge was one such example. *CUT Found., supra,* 2018 CO 36, ¶30.

The danger here is that voters will not know that they are converting fees into taxes. At least the original version of this measure identified "prohibited fees." Their revised version does not, and the treatment of fees as taxes is hidden from voters in violation of the single subject requirement. A key purpose of that mandate is, after all, "to prevent surprise and fraud from being practiced upon voters." C.R.S. § 1-40-106.5(1)(e)(II).

In this regard, the title misstates the subject of #283. The subject is not "limiting new or increased fees." It could be more accurately described as "converting certain state or local fees into taxes." Or "prohibiting state or local fees unless fee payers receive, in return, specific benefit." Or even "defining the term, 'fee.'"

It is not an answer to this concern merely to say that the courts will figure it out after the election. That response ignores the essential protection for voters that the single subject requirement is supposed to afford. Specifically, the single subject requirement insulates voters from "the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative." *In re Title, Ballot Title & Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007)

Neither is this a mere "effect" of the measure. Proponents used language in Initiative #283 that is intended to, and does, change the legality and the treatment of various fees including regulatory fees. But the measure never makes that clear. In no small part, Initiative #283 does this because it now would require that a fee be "voluntarily incurred" when the state of the law in Colorado has been just the opposite. *Bloom v. City of Ft. Collins*, 784 P.2d 304, 310 (Colo. 1989) ("We have never held, however, that a service fee must be voluntary").

And finally, it is no answer to say that the Supreme Court approved the initiative's text a decade ago. That challenge to the single subject of this language was different in nature and kind from the legal points raised here, largely challenging language that is not included in this measure. Further, that single subject decision was handed down in 2014; the Court decided *Colo. Union of Taxpayers Found., supra,* dealing with regulatory charges, four years later. Therefore, the state of the law has evolved since the time when a portion of this initiative text was judicially approved based on a different single subject objection.

II. The title is misleading.

A. Initiative #283 does not just change "fee" for TABOR purposes; it changes "fee" as to every state statute and municipal ordinance.

The title incorrectly states that new definition of "fee" only affects TABOR. But this constitutional definition applies much more broadly than that. At least 30 state statutes use the term and impose a "fee" as do many more municipal ordinances.

The "fee" definition may be placed in the constitutional provision known as TABOR, but that provision applies to every local unit of government including all districts. Voters should not be told this measure is limited in its reach when it is not.

When the Court considered the title to a similar measure 10 years ago, it did not use such a reference to TABOR. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #129*, 2014 CO 53, 333 P.3d 101. The Board should not do so now.

B. The single subject statement – "an amendment to the Colorado constitution limiting new or increased fees" – is not balanced, factual, or fair.

The fiscal summary for this measure states:

> State and local revenue. Defining "fee" in the state constitution **may reduce state and local government revenue** if the measure is interpreted as limiting the scope of charges that governments can impose without voter approval…. The measure does not have an immediate impact on economic activity. **Any economic impact would depend on how the measure is interpreted,** and subsequent government decision-making regarding fees and revenue in response to that interpretation.

https://leg.colorado.gov/sites/default/files/initiatives/2024%2523283FiscalSummary_00.pdf (emphasis added).

If the budgetary experts advising the Title Board have the opinion that, at most, the new definition in Initiative #283 "may" limit imposition of fees, it is unreasonable for the Board to describe Initiative #283 primarily as "limiting new or increased fees." This assessment is almost certain "to color the merit of the proposal on one side or the other." *Say v. Baker*, 322 P.2d 31, 320 (Colo. 1958). Therefore, this language is neither neutral nor reflective of the fiscal analysis performed on this initiative.

As an alternative, it would be more accurate to say that this is an amendment "defining the term 'fee,' and in connection therewith…."

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #283 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution and for failing to set an accurate title.

Respectfully submitted this 24th day of April, 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 #283** was sent this day, the 24th day of April, 2024, via email to Proponents' legal counsel, to:

Suzanne Taheri
st@westglp.com

s/ Erin Mohr
Erin Mohr