BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Lori Hvizda Ward,
Objectors,

v.

Linda White and Rich Guggenheim,
Designated Representatives of Initiative 2023-2024 #160.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #160

Through legal counsel, Lori Hvizda Ward, registered elector of Larimer County, hereby files this motion for rehearing on Initiative 2023-2024 #160.

On February 21, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #160:

> *Shall there be a change to the Colorado Revised Statutes restricting participation in athletic programs based on biological sex at birth, and, in connection therewith, requiring a public school, private school that competes against a public school, or a school activities association to designate each interscholastic, intramural, or club athletic team, sport, or event as female, male, or coeducational; only allowing females as designated on their birth certificate issued at or near birth to compete in a female designated athletic team, sport, or event; prohibiting a governmental entity from taking adverse action against an entity or person for compliance with statutory requirements; establishing a private cause of action for a female student who suffers harm as a result of noncompliance; requiring the state to assume financial responsibility for any expense related to a lawsuit or complaint related to compliance; and waiving sovereign immunity for failure to comply?*

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

I. The Board lacked jurisdiction due to #160'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. The single subject statement "restricting participation in athletic programs based on biological sex at birth" is inconsistent with the portion of the measure that specifically prohibits restrictions on the basis of biological sex at birth.

The single subject statement, attempting to encapsulate the essence of the measure, states its goal is "restricting participation in athletic programs based on biological sex at birth." That statement is inaccurate, reflecting a bifurcated measure that restricts participation and doesn't restrict participation.

The measure is explicit. "Nothing in this section shall be construed to restrict the eligibility of any student to participate" in an athletic event "for males, men, or boys, or coed or mixed." Proposed Section 22-32-116.6(2)(b). This portion of the measure quite clearly does not "restrict[] participation in athletics programs based on biological sex at birth" as the single subject statement asserts. A measure that both creates a restriction and prohibits a restriction based on a person's sex designated at birth cannot fit within the single subject statement in this title.

The measure thus violates the single subject requirement.

B. The measure creates a new standard for compensable injury – "indirect emotional harm."

Under #160, lawsuits may be filed to seek remedies for "indirect" harms. Proposed Section 22-32-116.6(3)(a). It's hard to know what this entails precisely, 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'").

As a reminder, #160 allows for litigation to address "any psychological, emotional, or physical harm suffered." Proposed Section 22-32-116.6(3)(b). Thus, persons who feel they have suffered an "indirect emotional" harm can sue for an alleged violation of this newly created protected status.

But the Colorado courts do not recognize "indirect emotional" harm as the basis for a compensable claim. "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." *James v. Harris*, 729 P.2d 986, 988 (Colo. App. 1986) (rejecting "indirect harm" as sufficient basis for action alleging negligent infliction of emotional distress), citing *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 301 N.Y.S.2d 554, 561-62, 249 N.E.2d 419, 424 (1969).

Thus, this measure reverses long-standing doctrine for what is and what is not compensable injury when an emotional harm is alleged. In fact, "psychic harm" alone does not constitute injury-in-fact that would even confer standing to sue. *Hickenlooper v. Freedom from Religion Found., Inc*., 2014 CO 77, ¶20. Initiative #160's expansion of compensable injury is a change in law that is truly "coiled in the folds" and thus a violation of the single subject mandate. *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007).

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.

D. The measure applies to "athletics programs for minors" but its failure to define "minors" means the reach of the measure is so broad as to violate the single subject reqruiement and so confusing as to prevent knowledgeable voting.

#160 addresses "athletics programs for minors." Initiative #160 is silent on what "minors" means, but generally applicable Colorado law defines "minor" as "any person who has not attained the age of twenty-one years." C.R.S. § 2-4-401(6). Thus, any person under the age of 21 will trigger the measure's regulation – and the limits on participation in athletics and the attendant liability where there is any participation at odds with these standards. Thus, a program that was portrayed as applying to K-12 students really applies to all of those students and anyone engaged in any of the interscholastic, intramural, or club sports at a college level.

Regulating what happens in elementary and secondary schools is a topic that is unrelated to what happens in colleges and universities. Perhaps the Title Board was aware of the measure's reach, and perhaps not. But voters would not appreciate the broad drafting and excessive reach of this measure. And they would certainly be surprised about it after a successful election. This is the essence of the concern about single subject non-compliance.

The Supreme Court rejects as unconstitutional those initiatives that are "umbrella proposals," *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶10, as well as those that can only be characterized by an "overly broad theme." *In re Title, Ballot Title and Submission Clause for Initiative 2021-2022 #1*, 2021 CO 55, ¶22. This Board should do the same as to Initiative #160.

E. The measure's applicability to all "hosting, organizing, or facilitating" organizations is reflection of its overly broad theme rather than a single subject.

Initiative #160 does not only mandates standards for public schools and districts. It also imposes liability for allowing participation in female athletic events for any activities association or organization hosting, organizing, or facilitating public school athletics." The reach of this provision would also surprise voters.

The fact that college students are included within this measure's ambit means that every "organization hosting, organizing, or facilitating public school athletics" are also drawn into lawsuits over compliance with #160. The NCAA, for instance, would not be able to establish a standard for participation in any sport at any level that is at odds with #160. If it did, it would be subject to the cause of action created by this measure.

Similarly, a college or university that "host[s]" a tournament that includes a Colorado school would face the same consequence. As a reminder, #160 does not require that an athletic event occur in Colorado in order to trigger the measure's provisions.

Moreover, athletic events are often "hosted" at private facilities. Would a private golf course that hosts a high school tournament but does not allow the line-drawing that is at the core of #160 subject itself to liability as a hosting organization? Would a rec center that hosts a swim meet but does not allow this line-drawing also be open to suit? The answer to these questions (and so many more analogous situations) is "yes."

This breadth of applicability is something that no one in this process has envisioned in the public discussion of #160 – to this point. But in light of the above discussion, it is clear that #160 violates the single subject requirement because it, too, has subjects that are part of an "overly broad theme." *Id.*

II. The titles set are incomplete and misleading.

A. The single subject statement in the titles does not make it clear that the measure both creates and prohibits restrictions based on the biological sex assigned at birth.

As discussed above, the single subject statement is inaccurate. The measure does not only "restrict[] participation." It allows for a double standard such that there are no restrictions in athletics that are assigned to males, men, boys, or coed or mixed. Thus, this single subject statement is confusing and incorrect.

If this measure is deemed to be a single subject, the single subject statement is accurate only if it is rephrased. One possible approach would be for the single subject statement to reflect that the measure deals with "*regulating* participation in athletic programs based on biological sex at birth" rather than "restricting" such participation.

B. The titles fail to state that the measure allows students and public athletics providers to be sued for any "indirect" harms.

As set out above, this measure creates a heretofore unknown breadth of harms to be used as the basis for legal actions – namely, "indirect emotional harm" as well as "indirect psychological harm." Voters should know that such actions allow for greater recovery for plaintiffs than any other set of emotional or psychological harms that are litigated. *See generally Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777-78 (1983) (rejecting claim that psychological harm or other indirect effects could be litigated under federal law as flowing from environmental consequences of an energy generation plant siting decision); *cf. Dean v. Allstate Ins. Co.*, 878 F.Supp. 1397, 1400 (D. Colo. 1993) ("indirect harm" in the form of "second-hand distress is not what is contemplated under Colorado law" for claim of reckless infliction of emotional distress).

Specifically, the titles should relate that this proposed law will *not* "limit the legal consequences of wrongs to a controllable degree." *James, supra*, 729 P.2d at 988. Voters should know this is an open-ended invitation to litigation over whatever might qualify as indirect emotional harm – including an elementary school student's disappointment over losing an intramural contest or an adolescent's dismay over a poor showing in a particular pre-season game. In short, they 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 which means that, as taxpayers, those same voters stand to foot the bills for such lawsuits under #160.

C. 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). Therefore, the title should inform voters that the measure will allow parties to seek an unlimited array of remedies to address even "indirect" harms alleged.

D. The title's reference to "waiving sovereign immunity" for a "failure to comply" will be virtually meaningless and confusing to voters.

The term sovereign immunity is legal jargon. Lawyers (many of them, anyway) could probably define it fairly accurately. But it is error to think that most lay people know what it means.

When a person's susceptibility to litigation is to be communicated in a ballot title, the Board has historically described what it means by stating that a specific party "shall not be immune from suit" for specific legal injuries. *See In re Title, Ballot Title and Submission Clause, and Summary for Unsafe Workplace Environment Amendment*, 830 P.2d 1031, 1033 (Colo. 1992). The Board should do so here as well, indicating that the array of parties identified in #160 can all be sued for relief.

Additionally, the "failure to comply" reference in terms of this susceptibility is vague and incomplete. The acts that would lead to such a lawsuit should be identified in the titles.

E. The title fails to state that the measure applies to "minors" – all persons who are students under the age of 21.

As discussed above, the measure applies to college students as well as elementary and secondary school students because it governs programs relating to "athletics programs for minors." The measure itself only states that it applies to a "student" or "students." Proposed Section 22-32-116.6(1)(a), (1)(b), (2)(a), (2)(b), (3)(a), (3)(c). "Student" is also undefined in #160. Given the meaning of "minors" generally, Initiative #160 would apply to college and university students under the age of 21. But voters would never know, even though they should. As currently worded, the title for #160 is incomplete and legally flawed.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #160 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 28th day of February, 2024.

RECHT KORNFELD, P.C.

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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 #160 was sent this day, February 28, 2024, via first-class mail, postage paid to:

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