COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2017-2018 #70

MOTION FOR REHEARING

On behalf of Jeff Wasden, registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing for Initiative 2017-2018 #70 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

I. THE TITLE BOARD LACKS JURISDICTION BECAUSE THE PROPOSED MEASURE FAILS TO DESIGNATE AS A CHANGE TO EXISTING LAW THE CRITICAL PART OF THE MEASURE.

The Title Board should deny jurisdiction to consider this measure because it fails to indicate that its central, and most substantial, feature is a change to the current law. The heart of this measure is to dramatically increase (by 100% to 350%) the severance tax rate on oil and gas production beginning on January 1, 2019. Although all other changes and additions to the current law are clear because they are in capital letters or denoted with a strike-through, the final text submitted to the Title Board does not convey the new tax rates in capital letters or with any other indication. Rather, the new tax rates in section 39-29-105(1)(c) of Section 2 of the measure read:

Under $25,000	7%
$25,000 and under $100,000	8%
$100,000 and under $300,000	9%
$300,000 and over	10%

Therefore, the text of the measure does not indicate that the tax rates listed above have been dramatically increased from their current rates of 2%, 3%, 4% and 5%, respectively. Not only are these increases significant, ranging from doubling to more than quadrupling current severance tax rates, but they are indisputably the central feature of the measure and result in a tax increase of hundreds of millions of dollars annually. And yet, a voter reading the proposed measure would have no way of confirming that the percentage rates listed are being changed without comparing the measure to the current tax rates.

II. THE TITLE BOARD LACKS JURISDICTION TO SET A TITLE BECAUSE THE PROPOSED MEASURE IS SO VAGUE AND CONFUSING THAT IT CANNOT BE UNDERSTOOD.

Initiative #70 is an updated version of Initiative #20, which is a measure that the Title Board declined to set title for on the grounds that it lacked jurisdiction. Although Initiative #70 did not go through review and comment because Legislative Council determined that it had already expressed its concerns to the Proponents during previous review and comment hearings,[1] at the review and comment hearing for Initiative #20 Legislative Council was compelled to ask a variety of clarifying questions to understand the measure. The Proponents either did not answer these questions or answered them in such a manner as to cause more confusion. The concerns mentioned in the following examples have not been addressed by Initiative #70:

1. Question 6 in Initiative #20's Review and Comment Memorandum asked, with respect to section 39-29-105(3), whether the Proponents intended for (a) the state to retain all of the oil and gas severance tax revenue collected after January 1, 2018 as a voter-approved revenue change to the fiscal year spending limit in TABOR, or (b) the state may retain the increased revenue as a voter-approved revenue change. When asked that question at the review and comment hearing, the Proponent said "I like (b) better than (a)," but, after the staff stated that they think it is (a), he changed his answer and agreed with Legislative Council that the answer is (a).[2] Section 39-29-105(3) in Initiative #70 contains the exact same language as it did in Initiative #20. Therefore, whether the measure "deBruces" all or some of the tax revenue remains a significant issue that must be included in the title, but only if the measure can be clearly understood. It cannot.

2. Question 8 in Initiative #20's Review and Comment Memorandum asked: "Can the voters from the state, which is one district for purposes of TABOR, approve a voter-approved revenue change for the other districts?[3] When asked that question at the review and comment hearing, the Proponent responded that he "d[oesn't] know what that question meant,"

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[1] *See* Proposed Initiative #70's Waiver Letter at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/70WaiverLetter.pdf. Initiative #70 is the Proponent's *eighth version* of this measure for 2017-2018, and the only one not to have gone through review and comment.

[2] *See* discussion starting at 35:20 of Initiative #20's review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

[3] *See* discussion starting at 37:45 of Initiative #20's review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

but then later said "yes." This answer raises "deBrucing" concerns at the district level because the state vote could impact district-level spending limits without the question being put to the district voters. However, Initiative #70 does not address these concerns. Such an important effect needs to be in the title, but again, only if it can be understood.

3. Question 12 in Initiative #20's Review and Comment Memorandum asked: "Does the limit on the 125% of revenue in the perpetual base account apply beginning in the second fiscal year? And if so, what year is that fiscal year?" When asked that question at the review and comment hearing, the Proponent did not provide a definitive answer.[4] This question remains unanswered in Initiative #70.

4. Question 13 in Initiative #20's Review and Comment Memorandum asked: "Is there any circumstance that you intend the corpus of the perpetual base account to be used?" When asked that question at the review and comment hearing, the Proponent responded by asking "what is the answer here?" and then agreed with Legislative Council's suggested answer of "no."[5] Initiative #70, again, does not provide a definitive answer to this question.

In light of these and other questions that were not definitively answered and/or addressed in Initiative #70, there remain too many unresolved issues for the Title Board to set a title.

III. INITIATIVE #70 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

Although the Proponents have stated that the single subject of their measure is a "severance tax," the measure actually contains multiple separate subjects because it (1) changes the severance tax, (2) modifies the allocation of revenue from that tax, and (3) exempts state-level spending limits from TABOR and "deBruces" district-level limits by allowing voters from the state to approve a voter-approved revenue change for individual districts.

TABOR prohibits state and local governments from raising tax rates or increase spending limits without voter approval. If Initiative #70 were to be on the ballot and pass, it will have received voter approval for increasing state-level spending limits. However, the district-level spending limits would not have been

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[4] See discussion starting at 44:20 of Initiative #20's review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

[5] *See* discussion starting at 45:00 of Initiative #20's review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

passed by voters in the local districts that would receive severance tax revenue under Section 39-29-108(2.3) of Section 4 of the measure. We are unaware of any ballot initiative that has attempted to "deBruce" district-level limits without a vote at the district level. Moreover, such a practice may be contrary to TABOR's requirement that voters approve any tax raise or increase to spending limits.

By "deBrucing" district-level limits, Initiative #70 would affect local governments and alter how voters raise taxes and increase spending limits. *See In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 448 (Colo. 2002) (holding that "[p]rohibiting municipal legislation from being referred to that city's registered electors when the success of such referendum would 'reduce private property rights,' represents a significant invasion of this fundamental constitutional right" and is a second subject). Voters would be surprised to learn that by voting for a measure purporting to raise the severance tax on oil and gas production, they also would be increasing district-level spending limits without a local vote.[6] *See id.* (noting that "voters would be surprised to learn that by voting for an initiative purporting to deal with the procedural aspects of the right to petition, they had excluded zoning matters that 'reduce private property rights' from the right of referendum"). Therefore, this feature of the measure constitutes a separate subject from changing the severance tax and modifying the allocation of revenue from that tax. *See id.* at 447 (holding that a measure repealing TABOR contains violates the single-subject requirement because TABOR itself has multiple subjects).

IV. THE TITLE IS MISLEADING AND CONTAINS AN IMPERMISSIBLE CATCHPHRASE.

a. The title is misleading because it fails to capture the magnitude of the severance tax increase.

The title states that Initiative #70 will "increas[e] the severance tax rates by 5 percentage points." This description of the measure's central feature fails to adequately convey the extent of the rate increase on the oil and gas industry. Because "5 percentage points" seems miniscule, a voter reading the title likely would think that the measure minimally increases the severance tax. Only by comparing the rates in the measure to the current statutory rates (in part, because the measure fails to show that the rate increases are changes to current statute) would a voter grasp the full significance of the tax increase.

Instead, the title should state that the measure will "increase[e] the severance tax rates by 100% to 350%." Such a statement more accurately

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[6] For example, voters are accustomed to voting on oil and gas issues, such as fracking, at the local level.

encapsulates the magnitude of the severance tax increase and avoids misunderstanding.

b. The title contains an impermissible catchphrase.

The phrase at the end of the title—"negative health impacts proximately caused by oil and gas production"—is an impermissible catchphrase. The Colorado Supreme Court has made clear that phrases that "work in favor of a proposal without contributing to voter understanding" must be avoided. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000, No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). The words chosen by the Title Board "should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion." *Id.*

Here, the phrase is a catchphrase because it does not add to voter understanding. The average voter does not know what "proximately caused" means, and the phrase assumes that negative health effects from oil and gas production exist. *See In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 650 (Colo. 2010) (noting that phrases that mask basic policy questions underlying an initiative are impermissible catchphrases). Therefore, the phrase is a slogan likely to appeal to voters' emotions regarding ongoing state and local policy conversations on the effects of oil and gas production. *In re # 258(A)*, 4 P.3d at 1100 (noting that the Court "determine[s] the existence of a catch phrase or slogan in the context of contemporary political debate"). "Slogans are catch phrases tailored for political campaigns—brief striking phrases for use in advertising or promotion," and "[t]hey encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposal's merits." *Id.* The phrase is thus not neutral and must be stricken from the title.

V. THE ABSTRACT IS MISLEADING UNDER SECTION 1-40-107(1)(a)(II)(B).

a. *The abstract is misleading because it does not accurately describe who will bear the severance tax increase.*

The proposed measure's abstract implies that only oil and gas companies will bear the severance tax increase when, in fact, all non-governmental persons, including individuals, with a revenue interest in the production will bear the increase. For example, the Fiscal Impact Statement, to which the abstract is attached, states that "the measure increases the oil and gas severance tax rate by 5 percentage points for all operators." (Emphasis added). Therefore, the abstract is misleading under section 1-40-107(1)(a)(II)(B), and the Title Board should amend it.

b. *The abstract is misleading because it does not mention the proposed measure's elimination of the tax credit.*

The proposed measure's abstract does not mention the elimination of the tax credit or explain its fiscal impact. This is another reason why the abstract is misleading under section 1-40-107(1)(a)(II)(B). The Title Board should amend the abstract to include reference to the tax credit elimination.

VI. THE ABSTRACT FAILS TO PROPERLY DETAIL THE MEASURE'S ECONOMIC IMPACTS AND THUS DOES NOT COMPLY WITH THE REQUIREMENTS SET FORTH IN SECTION 1-40-105.5(3).

An abstract must include "[a]n estimate of the measure's economic benefits for all Coloradans." C.R.S. § 1-40-105.5(3)(b) (emphasis added). The proposed measure's abstract, however, includes only vague statements as to what some of the potential economic impacts could be.

For example, the abstract states that "[t]o the extent the tax increase limits oil and gas development, there will be less oil and gas employment, less demand for associated services, reduced rent and royalty income to mineral owners, and reduced profits for oil and gas companies." These statements lack specificity and provide no meaningful information for voters regarding the magnitude of lower employment and economic activity, which could be significant given the size of the proposed severance tax rate increases. Rather than a statement that there will be "less" oil and gas employment to the extent that the tax decreases oil and gas development, the abstract should provide possible scenarios, or if a definitive answer is not possible, what ranges are more likely given their economic analysis. Instead, the Fiscal Impact Statement to which the abstract is attached simply avoids the issue by stating that it "does not attempt to estimate a behavioral response to the increased oil and gas severance tax," which is reflected in the abstract.

Under basic concepts of supply and demand, the severance tax increases certainly will cause behavioral responses (*i.e.*, higher severance taxes will affect business decisions, which will affect employment), and any meaningful fiscal impact statement and abstract must factor in these responses or at least provide likely scenarios. Indeed, that is the entire point of the requirement. Because the abstract fails to comply with section 1-40-105.5(3)(b), it must be returned to Legislative Council for reconsideration.

CONCLUSION

Accordingly, the Objector respectfully requests that this Motion for Rehearing be granted and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 22nd day of November, 2017.

/s/ Jason R. Dunn
Jason R. Dunn
David Meschke
Brownstein Hyatt Farber Schreck LLP
410 17th Street, #2200
Denver, Colorado 80202
(303) 223-1100
(303) 223-0914
jdunn@bhfs.com
dmeschke@bhfs.com

Attorneys for Jeff Wasden

Address of Objector:
3081 W. White Oak Trail
Highlands Ranch, CO 80129

16154564