BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Norma B. Akright,
Objector,

v.

Michael Tsogt and Kristi Burton Brown,
Proponents of Initiative 2023-2024 #224.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #224

Norma B. Akright, registered elector of Montrose County, hereby files this motion for rehearing on Initiative 2023-2024 #224.

On April 3, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #224:

> *Shall there be an amendment to the Colorado constitution requiring state law that was enacted through the citizen initiative process can only be modified through a subsequent ballot measure or with a three-fourths majority vote of both the Colorado House of Representatives and Senate?*

Violations of the Single Subject Requirement

I. Initiative #224 removes judicial authority including the authority to sever an unconstitutional measure.

Proponents prohibit legislative action that "modifies" an initiated statute. This is a single subject violation.

When considering whether an unconstitutional law can be severed, the courts engage in the following analysis so they can act, if possible, to save portions of the statute.

> The law in question must be "readily susceptible" to a limiting construction.... Hence, **we will look to fix the law** but will not rewrite the law. We strike as little of the law as possible, with a preference for only partial, not complete, invalidation…. In so doing, we must take into account any severability clause, which demonstrates the lawmaking body's intent that the law remain largely in force despite particular, limited infirmities. A severability clause raises a

presumption that parts of a law can and should be struck without upsetting the law's proper purpose.

Dallman v. Ritter, 225 P.3d 610, 638 (Colo. 2010) (emphasis added). If a portion of the statute is unconstitutional, the original statute has been modified because certain aspects have been struck and are of no effect. This is the natural understanding of "modify." *See* Online Cambridge Dictionary (defining "modify to mean "**to change something such as a** plan, opinion, **law**, or way of behavior slightly, usually to improve it or make it more acceptable"). Certainly, when a court "fixes a law," it changes it to improve it or make it more acceptable.

Proponents maintain they are adapting municipal charter provisions into state law. A number of municipalities do limit a legislative body's options as to initiated laws, but they do not do so in the manner suggested by Proponents. For instance, larger cities (Colorado Springs,[1] Greeley,[2] Sheridan,[3] Brighton,[4] and Lakewood[5]) and smaller towns (Morrison,[6] Tinmath,[7]

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[1] Colo. Spgs. City Charter, art. XI, section 12-10(d) ("An ordinance so adopted by a vote of the electors cannot be **repealed or amended** except by a vote of the electors"). https://codelibrary.amlegal.com/codes/coloradospringsco/latest/coloradosprings_co/0-0-0-25980

[2] Greeley City Charter, art. IX, section 9-6(A) ("No initiated ordinance adopted by the registered electors of the City may be substantively **amended or repealed** by the Council during the period of one (1) year" after the initiated ordinance is effective"). https://library.municode.com/co/greeley/codes/municipal_code/330765?nodeId=PTICHGRCO_ARTIXINRE_S9-1POIN

[3] Sheridan City Charter, art. VI, section 6.6(A) ("No initiated ordinance adopted by the registered electors of the City may be substantively **amended or repealed** by the Council during a period of one (1) year after the date of the election on the initiated ordinance, unless the amendment or repeal is approved by a majority of the registered electors of the City"). https://www.ci.sheridan.co.us/DocumentCenter/View/175/Article-6?bidId=

[4] Brighton City Charter, art. VI, section 6.5(A) ("No initiated ordinance adopted by the registered electors of the City may be substantively **amended or repealed** by the Council during a period of one (1) year after the date of the election on the initiated ordinance, unless the amendment or repeal is approved by a majority of the registered electors of the City") https://www.brightonco.gov/DocumentCenter/View/59/CITY-OF-BRIGHTON-CHARTER

[5] Lakewood City Charter, art. XIII, section 13.3 ("No initiated ordinance adopted by the registered electors of the City may be **amended or repealed** by the City Council during a period of six months after the date of the election on the initiated ordinance") https://library.municode.com/co/lakewood/codes/municipal_code?nodeId=PTICH_ARTXIIIINRE_13.1INPR

[6] Morrison Town Charter, art. 5, section 5.4(a) ("No initiated ordinance adopted by the registered electors of the Town may be substantively **amended or repealed** by the Board during a period of one (1) year after the date of the election on the initiated ordinance") https://codelibrary.amlegal.com/codes/morrisonco/latest/morrison_co/0-0-0-7072

[7] Tinmath Town Charter, art. 6, section 6.5.1 ("No initiated ordinance adopted by the registered electors of the Town may be substantively **amended or repealed** by the Board during a period of one (1) year after the date of the election on the initiated ordinance") https://timnath.org/wp-content/uploads/2022/01/Home-Rule-Charter-Amended-Nov.-2015-1.pdf

Johnstown,[8] Frisco,[9] and Windsor[10]) have such provisions. Importantly, each one of them limits the ability of city councils to "amend or repeal" an initiated ordinance.

Amending an ordinance or a statute, for example, is a legislative act. *Vagneur v. City of Aspen*, 2013 CO 13, ¶ 40, 295 P.3d 493, citing *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981). Likewise, repealing a statute or an ordinance is a legislative act. *See Wilson v. People*, 85 P. 187 (Colo. 1906). But courts, whether they are severing a statute or interpreting it, can alter the way in which a statute is applied without amending or repealing the act. "It is, of course, not only permissible but in fact imperative to interpret the text of a statute in terms of its necessary implications…. When statutory text admits of contradictory reasonable interpretations, clarifying which interpretation embodies the legislative intent is the purpose of the rules of construction—not forbidden by them." *People v. Diaz*, 205 CO 28, 347 P.3d 621, 629 (Coates, J., concurring).

By using "modify" in Initiative #224, Proponents have gone well beyond the models they claim to emulate and the legislative acts they say they are trying to control. Instead, they will impede indirect actions affecting legislation including the ordinary course of judicial review. Changing even a limited universe of judicial review, when coupled with provisions instituting procedural reforms, violates the single subject requirement. *In re Title, Ballot Title & Submission Clause, and Summary for Proposed Petition Adding Section 2 to Article VII*, 900 P.2d 104, 109 (Colo.1995). Therefore, the single subject requirement has been violated.

II. Initiative #224 surreptitiously changes the ability of the General Assembly to legislate on matters that were passed by initiative.

Not only does the measure restrict the judiciary's ability to interpret the law and resolve cases presented to it, it surreptitiously changes the General Assembly's legislative power through the use of "modified." As conceded by Proponents in the initial title hearing, they are attempting to prevent the General Assembly from making changes that may affect an initiated measure. In other words, the prohibition in the measure isn't just to safeguard the specific provisions included

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[8] Johnstown Town Charter, art. VII, section 7.6(A) ("No initiated ordinance adopted by the registered electors of the Town may be substantively **amended or repealed** by the Council during a period of one (1) year after the date of the election on the initiated ordinance, unless the amendment or repeal is approved by a majority of the registered electors of the Town")
https://library.municode.com/co/johnstown/codes/municipal_code?nodeId=PREFATORY_SYNOPSIS_ART7INRERE_S7.1IN

[9] Frisco Town Charter, art. V, section 5-5(a) ("No initiated ordinance adopted by the voters may be substantively **amended or repealed** by the Council during a period of one (1) year after the date of the election on the initiated ordinance, unless the amendment or repeal is approved by a majority of the registered electors voting thereon")
https://www.friscogov.com/wp-content/uploads/2017/10/CHARTER110408.pdf

[10] Windsor Town Charter, art. VII, section 7.5(A) ("No initiated ordinance adopted by the registered electors of the Town may be substantively **amended or repealed** by the Board during a period of one (1) year after the date of the election on the initiated ordinance, unless the amendment or repeal is approved by a majority vote of the registered electors of the Town").
https://library.municode.com/co/windsor/codes/charter_and_municipal_code?nodeId=TOWIHORUCH_ARTVIIINRERE_7.2RE

in an initiative but reaches to other parts of a statute—or even entirely different Titles in the Colorado Revised Statutes—that affect the initiative.

Consider, for example, a complex code like Title 1. An initiated measure adds a subsection to one provision on campaign finance that relies upon a defined term in the code. The General Assembly later identifies a problem in an entirely different part of the code that requires adjusting the defined term. However, because that defined term was used in an initiated measure, that change can no longer be made without another ballot measure or a super-majority vote of the General Assembly.

Similarly, an initiated statute that requires expenditure of a specific dollar amount on a program established or expanded by the initiative could never be changed, not even to increase that amount for a successful program or just to account for inflation. The legislature would also be prohibited from adjusting programmatic directives and priorities to meet budgetary realities or shortfalls. Thus, the General Assembly's plenary appropriation powers would be restricted by Initiative #224. "The General Assembly has plenary power over the appropriation of 'state monies,' subject only to constitutional limitations." *Colo. Cmty. Health Network v. Colo. Gen. Assembly*, 166 P.3d 280, 283-284 (Colo. App. 2007), citing Colo. Const. art. V, § 33 ("No moneys in the state treasury shall be disbursed therefrom by the treasurer except upon appropriations made by law, or otherwise authorized by law . . . ."). But voters would not intend, much less know, of this aspect of the measure when they consider it.

Likewise, a fee set by initiative could not be reduced if the program didn't require the funds generated or if it came to an end. Neither could be increased to pay for additional costs incurred by government to pay for programmatic benefits to fee-payers. In other words, the General Assembly could not use its constitutional authority to meet the voters' intent by adjusting the fee level to match the program's need or success.

This measure is thus working a profound change on the legislative branch that voters will not understand. The initiative does not just limit the legislature's ability to amend an initiative, it prevents the legislature from addressing unrelated issues simply because of some incidental impact on an initiative. That type of limitation on the General Assembly is a second subject.

III. Initiative #224 surreptitiously undermines Amendment 71 which made it more difficult to amend the Colorado Constitution.

In 2016, voters adopted Amendment 71 to make it more difficult to amend the Constitution. The primary justification for this amendment was that it would encourage lawmaking by initiated statute. "Amendment 71 is expected to encourage citizen-initiated changes to law in statute by making it harder to amend the constitution. Statutory changes allow the legislature to react when laws require clarification or when problems or unforeseen circumstances arise." Legislative Council of the Colorado General Assembly, Research Publication No. 669-6 at 32 (2016).

In what is intended to pass for a procedural protection of initiated laws, Initiative #224 effectively asks voters to eliminate the structural advantage they promoted for initiated statutes. "It is ironic that in approving a seemingly innocuous initiative proposing to [achieve one

objective], voters may inadvertently nullify their only protection against the dangers of [a structural threat]—a protection on which they had insisted only eight years ago." *In re Title, Ballot Title & Submission Clause for 2011-2002 #43*, 46 P.3d 438, 446 (Colo. 2002). This coiled-in-the-folds design of Initiative #224 violates the single subject requirement.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #224 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution.

Respectfully submitted this 10th day of April, 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 #224** was sent this day, the 10th day of April, 2024, via email to counsel for the Designated Representatives:

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