

Before the Colorado Ballot Title Setting Board

Suzanne Taheri and Michael Fields, Objector/Proponents

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #46

Suzanne Taheri and Michael Fields, registered electors of the State of Colorado and proponents of Initiative 2021-2022 #46 object to the Title Board's title and ballot title and submission clause set for Initiative 2021-2022 #46, The Board met on October 6, 2021, to consider Initiative 2021-2022 #46 and set the following title:

There shall be a reduction to the state sales and use tax rate by 0.34 percent, thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to health and human services programs, K-12 education, and corrections and judicial operations by an estimated 14.6 million dollars in tax revenue in the first full fiscal year, by a change to the Colorado Revised Statutes that reduces the state sales and use tax rate from 2.90 percent to 2.89 percent from January 1, 2023, through December 31, 2024.

Proponents object to the title as set because it is inaccurate, misleading and fails to properly reflect the central feature of the proposed measure. The title set by the Board incorrectly states that the passage of Proposed Initiative 2021-2022 #46 would reduce funding for health and human services programs, K-12 education, and corrections and judicial operations. The state economist disagrees.

Current Budget Projections:

According to the most recent projections published by Colorado Legislative Council Staff (June 2021 Economic & Revenue Forecast: <http://leg.colorado.gov/sites/default/files/images/junforecast.pdf>), state revenues are expected to exceed the TABOR refund limit from the current fiscal year and by an increasing amount through fiscal year 2022-2023 (See *Figure 2* at the end of this document).

Proposed Initiative 2021-2022 #46 reduces state sales tax revenue by an estimated \$14.2 million per year. A TABOR refund is only triggered when state programs are funded in excess of the prior year's levels. The economic forecast shows a projected TABOR refund in excess of \$500 million for the next three fiscal years. While Proposed Initiative 2021-2022 #46 could be accurately stated to reduce the estimated TABOR refund by \$14.2 million, the economic forecast would need to be off by 38 times the proposed tax reduction in order for the proposed tax reduction to make a dent in even one of the three listed programs.

Requirements of HB 21-1321 v. Voter Confusion

Proponents recognize the Legislature's instruction in HB 21-1321. Unfortunately, the Legislature left the Title Board in an awkward position when it wrote instructions that did not

contemplate a reduction in revenue in a year where there is a projected surplus large enough to trigger a TABOR refund. The Court, however, has previously provided clear instruction on title setting. The ballot title must clearly convey to voters the initiative's likely impact on state spending on state programs. *Matter of Title, Ballot Title and Sub. Cl., and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999)

As we have already established, absent complete incompetence on the part of the state economist, the proposed title is clearly inaccurate. Despite the Legislature's instruction to the contrary, proponents have a right to an accurate title, and the Board has a duty to set the same. Proponents contend that the inaccuracy of the proposed title is so prejudicial as to interfere with their constitutional right to initiate. The potential consequences of reducing health and human services programs, K-12 education, and corrections and judicial operations far exceed any consequence of reducing a TABOR refund. Thus, any voter who reads the title as proposed will be unfairly influenced by the Board's decision to list programs for reduction despite the projection that funding for those programs will be unaffected by the proposed sales tax rate decrease. The title as set is certain to confuse voters who view a ballot title that says one thing and a Blue Book analysis that will clearly show contradictory facts.

Misleading and Inaccurate Title

Given the economic projections, there are no circumstances under which the proposed state sales tax reduction can be reasonably expected to reduce funding for health and human services programs, K-12 education, or corrections and judicial operations. Rather, there will be one reduction in state spending that comes as a result of the passage of Proposed Initiative 2021-2022 #46: spending for TABOR refunds. At worst, the title as set lies about the effects of Proposed Initiative 2021-2022 #46. At best, it is misleading. The Board is given great discretion in title setting, but it cannot expect its decision to be upheld when it sets a title that contains any statement that is outright false.

In setting the title for Proposed Initiative 2021-2022 #46, the Board failed to meet the requirement to, "correctly and fairly express the true intent and meaning of the proposed initiative and consider the public confusion that might be caused by misleading titles." *In re Ballot Title 1999-2000 Nos. 245(b), 245(c), 245(d), & 245(e)*, 1 P.3d 720 (Colo. 2000); *In re Ballot Title 1999-2000 Nos. 245(f) & 245(g)*, 1 P.3d 739 (Colo. 2000) Stating that the proposed initiative reduces state spending for anything other than a TABOR refund is inaccurate and prejudicial.

The Board's title fails to even mention TABOR refunds as a program that may be reduced by the passage of Proposed Initiative 2021-2022 #46. Because a TABOR refund only occurs in a year where there is revenue in excess of the TABOR growth cap, the Board's failure to mention TABOR refunds as one of the three targets for reduction effectively flips the voter's perception of the initiative from something that comes as a response to excess government revenues to something that threatens the state's ability to sustain important government programs in Colorado. Regardless of whether or not this was done at the Legislature's direction, the title as set clearly flies in the face of the Title Board's duty to set a clear and accurate title that properly informs the voters of the consequences of the initiative.

Alternative Approach

If the Board insists upon listing three programs in the title despite the evidence that none of those three programs will be affected by the proposed sales tax rate reduction, then the Board must inform the voters of the insignificant magnitude of the potential effect.

The proposed state sales tax rate reduction will reduce state revenues by an estimated \$14.2 million. The Fiscal Year 2020-2021 budget gives the following expenditure figures for each of the three listed programs: Health and Human Services (combined General Fund budget expenditures for the Department of Health Care Policy and Financing, the Department of Human Services, and the Department of Public Health and Environment) - \$4,205,093,547; K-12 Education - \$3,929,010,921; and Judiciary and Corrections - \$1,421,647,159. These actual budget figures establish that even if it is incorrectly assumed that the proposed initiative will affect any of the three listed programs, its effect on even the smallest of these programs (Judiciary and Corrections) is less than 1% of the program's 2020-2021 proposed budget. (Joint Budget Committee Appropriations Report Fiscal Year 2020-21: http://leg.colorado.gov/sites/default/files/fy20-21apprept_0.pdf)

If the title incorrectly states that these three programs will see their funding adversely affected by the proposed sales tax rate reduction, the title must also inform the voters of the magnitude (or lack thereof) of the effect. The total spending for the three listed programs is \$9,555,751,627. The \$14.2 million revenue reduction is 0.14% (one dollar for every \$14,000) of the total spending for those three programs.

The proponents strongly object to the proposed language for the ballot title. However, if the Board includes the language dictated by HB 21-1321, the proponents must equally insist on adding language to demonstrate the absurdly small effect that this tax reduction could have on state programs in the near-impossible event it has any effect at all. The Board must also notify voters that there may not be any effect at all because of projected TABOR refunds. Recognizing that it is still unacceptable because it still contains false statements, the proponents offer the following language in an attempt to craft a title that is less prejudicial. We preserve our objection to the inclusion of the three programs because of the now well-established fact that there will be no effect to these programs at all:

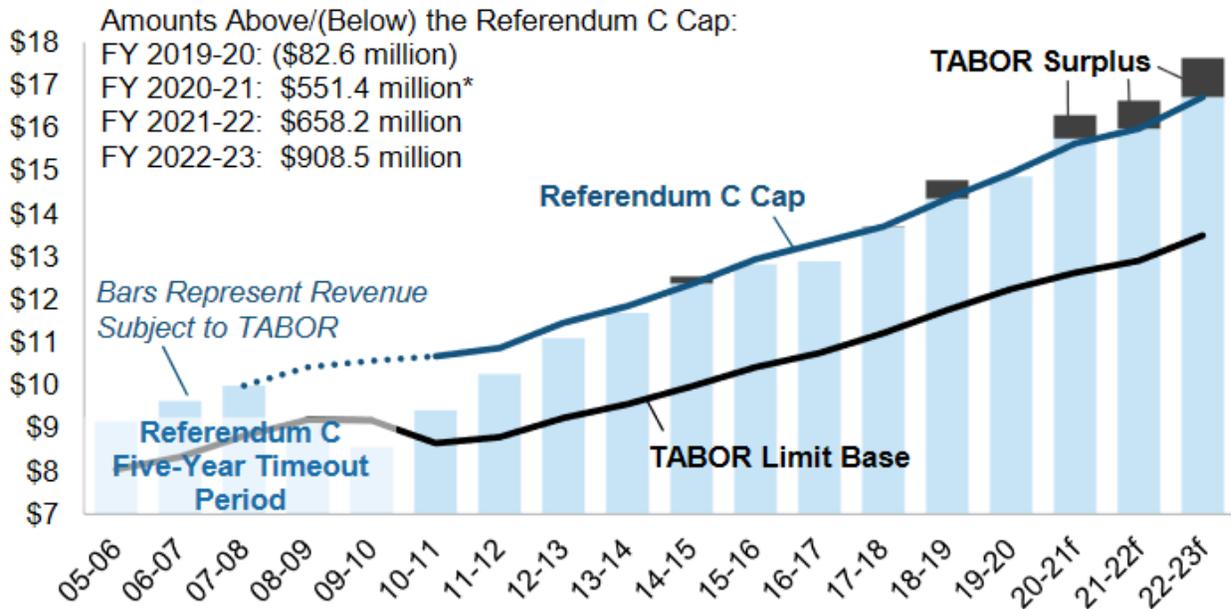
There shall be a reduction to the state sales and use tax rate by 0.34 percent, thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to health and human services programs, K-12 education, and corrections and judicial operations by an estimated \$14.2 million dollars in tax revenue, by a change to the Colorado Revised Statutes concerning reducing the state sales and use tax rate from 2.90 percent to 2.89 percent, effective July 1, 2023; the proposed reduction in state expenditures for programs is one dollar less for every 14,000 dollars received by the programs listed above, except in years where a TABOR refund is due in which years the TABOR refund will be reduced and there would be no reduction to the departments and programs listed above.

Conclusion

These economic projections establish that Proposed Initiative 2021-2022 #46 will have no

adverse effect on state programs. Even if it is assumed that the proposed initiative would adversely affect funding for state program, the effect is so small in magnitude (one dollar for every 14,000 dollars) as to be rendered insignificant. The proposed title makes a provably false claim about the effect of the initiative. It is therefore both misleading to voters and unfair to proponents. While the adverse effect of the defective title may be mitigated by adding language that illustrates the nearly insignificant effect of the tax rate reduction on the listed programs, no title that contains the proposed language about a reduction in funding for state programs can be construed as accurate because the State’s current revenue projections show that TABOR refunds larger than the amount of the proposed tax revenue reduction will be necessary for at least the next three fiscal years.

Figure 2
TABOR Revenue, TABOR Limit Base, and the Referendum C Cap
Dollars in Billions



Source: Office of the State Controller and Legislative Council Staff. f = Forecast.
 *Refunds for the FY 2021-22 surplus will be adjusted for overrefunds in prior years.

WHEREFORE, Initiative #46 title should be corrected in compliance with Colorado law.

Respectfully submitted this 12th day of October, 2021.

/s Suzanne Taheri
/s Michael Fields
 1600 Broadway, Suite 1600
 Denver, CO 80202
staheri@mavenlawgroup.com