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| SUPREME COURT, STATE OF COLORADO<br>East Fourteenth Avenue<br>Denver, Colorado 80203 | |
| District Court for the Eighth Judicial District<br>Honorable Thomas French<br>Case No. 16CV230 | |
| In Re:<br><br>Petitioner-Contestor:<br>Larry Sarner, an individual,<br><br>v.<br><br>Respondent-Contestee:<br>City of Loveland, a home rule city in the State of Colorado;<br><br>and<br><br>Respondent-Indispensable Party:<br>Angela Myers, in her official capacity as Larimer County Clerk and Recorder. | ▲ COURT USE ONLY ▲<br><br>Case No. 2016SA261 |
| **Self-Represented Petitioner-Contestor:**<br>Larry Sarner, *pro se*<br>711 West Ninth Street<br>Loveland, Colorado 80521<br>Telephone: 970-667-7313<br>larry.sarner@gmail.com | |
| **PETITIONER'S OPENING BRIEF** | |

All argument supporting my request for a Rule to Show Cause were included in my Petition (see Parts F and H) with the exception of the influence of the *Bickel* factors on this proceeding, which are briefed herein. I was expecting the issuance of a Rule to Show Cause, followed by the Respondent City's Showing, and an opportunity to Reply thereto. Since the Court has chosen a different process by requesting a briefing for this matter, this Opening Brief only emphasizes the denial of due process committed by the court below and the applicability of the *Bickel* factors when deciding whether the merits of my contest warrant the relief requested from the Court.

## FAILURE OF DUE PROCESS LEADING TO APPEAL

The election contest brought in the court below was a TABOR enforcement action.

Is it possible that a defense or enforcement of the requirements of the Taxpayer's Bill of Rights (TABOR, Colo. Const, Art. X, Sec. 20) requires that a plaintiff have two things: (1) a meritorious argument, and (2) $10,000? That is apparently what is thought in the Eighth Judicial District. A TABOR enforcement action, brought as an election contest over the form and content of two ballot questions (under CRS §1-11-203.5), was dismissed by the district court without hearing arguments on its merits (see Order for Dismissal: Exhibit 15 of Petition for

Rule to Show Cause). The ostensible reason for doing so was my failure to post a costs bond in the amount of $10,000.

Had I known that any court would *necessarily* impose a bond requirement of such size, I would not have begun this contest. Neither would *any* other reasonable person of ordinary means; certainly a court that would impose a $10,000 bond, regardless of the constitutional proscription of awards to defendants in TABOR enforcement actions would nonetheless make a $10,000 award regardless of controlling law. In posting a $50 bond as a placeholder, I relied on the constitutional promise in TABOR that its provisions can be enforced by citizens of ordinary means. *Cerveny v. Wheatridge*, 913 P2d 1110 at 1119 (Colo. 1996). My reliance on this guarantee was not misplaced. TABOR itself assures that no fees or costs, absent frivolity, can be awarded to the contestee City of Loveland (Colo. Const, Art. X, Sec. 20(1)), and this assurance is reflected in CRS §1-11-203.5(3). Moreover, as a *pro se* contestor, I also believed myself immune to any award for attorney's fees, except for a frivolous action (CRS §13-17-102(6)), and my action could not be frivolous as it raises several questions of law on first impression. *Western United Realty, Inc. v. Isaacs*, 679 P2d 1063 (Colo. 1984); also, CRS §13-17-102(7). See Motion to Deem Bond Sufficient; as Exhibit 12 of Petition for Rule to Show Cause.

Yet the judge below found that the contestee City required extraordinary protection against a hyperbolic burden that could not be practicably expended and could never be recovered even if it was. The amount of the bond ($10,000) was chosen simply for the reason that the City alleged an outlay of an improbable sum that "might well" be expended (see its Motion to Dismiss for Lack of … Jurisdiction ¶4; Exhibit 9 of my Petition for Rule)—in what is supposed to be an expedited litigation, lasting from filing to decision of not more than 20 days. *Cacioppo v. Eagle County Sch. Dist. RE-50J*, 92 P.3d 453 (Colo. 2004). Especially egregious was the City's expectation that: there would be "potential expert witness fees" in a matter that is statutorily required to be summarily adjudicated; was, at one point, scheduled for a *one-hour* hearing; and, in which no facts were in dispute.

Demands for a bond in this large amount can only be understood as an attempt to chill the contestor and consequently denying me access to the courts. The practical consequence was to make my contest, and any other similar contest, impossible. Because this court has held that any challenge of what is essentially the form or content of a ballot question is time-barred if not brought within five days of its setting, no other remedy is available before or after the election. (*Id.*) Therefore, the dismissal of the election contest in the court below was a denial of due process.

> "It is with pride that we say, and it is freely known to every citizen, that our courts respond immediately to rescue a citizen from those holding him under asserted governmental authority and to give him relief as against the sovereign power if the circumstances warrant." *Boxberger v. State Highway Department*, 250 P2d 1007 at 1008 (Colo. 1952).

If the decision of the court below is left to stand, the ability of any plaintiff to correct ballot questions that fail to conform with the requirements of TABOR, or any other state law, would be at an end for any citizen of ordinary means. This certainly could not have been what the voters intended by including TABOR in their constitution, nor could it be what the General Assembly had intended by adopting CRS §1-11-203.5. A local government must not be allowed to thwart a contest merely by making unsubstantiated suggestions of frivolity.[1] A local government must also not be allowed to posit a large, imaginary financial burden before the court and plead for protection from an impossible injury.

With this additional briefing, I renew my request in my Petition for a Rule reversing the order(s) for dismissal of the court below, and to make the Rule absolute.

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[1] The City alleged that my action was frivolous in its Affirmative Defenses (¶5) of its Answer (see Exhibit 8 of my Petition). The City also made unsubstantiated allegations that it would incur extraordinary costs and fees for its defense in their response to my motion for waiver of bond (*Id.*, Exhibit 7), in its motion to dismiss (*Id.*, Exhibit 9), and in its response to my motion to deem bond sufficient (*Id.*, Exhibit 13). The simple proof that these allegations were interposed exclusively for the purposes of obstruction and delay is evidenced by the absence of any actual attempt to recover its costs and fees incurred in the action in the court below. Time has now lapsed for any request or motion for costs and fees.

There can be no doubt, and it is not disputed here, that the requirement for a costs bond in an election contest protects against frivolous actions. However, since a non-frivolous action can be met with a high bond demand in the same manner as a frivolous action, and because the high cost bond can be an insurmountable barrier to jurisdiction, a determination of whether or not an action is frivolous should be considered a threshhold issue. In the present instance, the court below made no effort to test the veracity of the contestee's allegations of frivolous action before ordering a costs bond in an amount ($10,000) that could only be awarded to the defendant in a frivolous action.

## INFLUENCE OF THE *BICKEL* FACTORS

The easiest and most just result in the present matter would have been for this election contest to be heard on its merits in the court below. Every matter of first impression presented in my Petition (see 3rd through 6th issues, Part F of Petition for Rule) and every matter presented with particularity to the court below could have been addressed weeks ago by re-forming the ballot questions in some legitimate way. Even the *choice of electorate* issues (see 4th & 5th issues) could have been resolved in favor of my position by sending the questions back to the City for its choice of either withdrawal from the ballot or re-set for placement before the entire registered electorate of Loveland as required by TABOR.

Alas, the dilatory actions of the contestee now place the Court in the difficult position of having to consider, as a last resort, direct intervention with a set ballot in order to preserve the integrity of the process for achieving valid voter approval on debt and tax questions. There can be no doubt that it is always a better result to adjudicate an electoral dispute before the vote than to attempt remediation of an erroneous *electoral process* afterwards, and the legislative history of §203.5 reflects this purpose. See *Cacioppo, supra*, at 459.

In *Bickel v. City of Boulder*, 885 P2d 215 (Colo. 1994), the Court held that when determining whether voter approval required by TABOR is constitutionally obtained, there are at least three factors which can be considered:

> [W]e hold that a "substantial compliance" standard is the proper measure when reviewing claims brought to enforce Amendment 1's election provisions. In determining whether a district has substantially complied with a particular provision of Amendment 1, courts should consider factors including, but not limited to, the following: (1) the extent of the district's noncompliance with respect to the challenged ballot issue, that is, a court should distinguish between isolated examples of district oversight and what is more properly viewed as systematic disregard of Amendment 1 requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the district's noncompliance, and (3) whether it can reasonably be inferred that the district made a good faith effort to comply or whether the district's noncompliance is more properly viewed as the product of an intent to mislead the electorate.

It can be seen in my aboriginal contest before the court below (see Exhibit 8 of my Petition), I had made a case for the City's violation of each of the three factors described in *Bickel* for establishing substantial compliance with TABOR, even though the factors were not explicitly referenced. The subornation by the City of Loveland of the judge's decision leading to the aforementioned denial of due process undoubtedly invokes the third *Bickel* factor in support of a Rule to Show Cause. The City made no good faith effort to respond to the grounds for the contest or summarily adjudicate this matter. The frivolous opposition it interposed for the purposes of obstruction and delay evinced intent to maintain its misleading ballot questions. C.R.C.P. Rule 121 Section 1-15(7).

Unfortunately, time has marched on. As a practical matter, any opportunity to re-form the ballot questions at issue here lapsed concurrently with the order for dismissal from the court below. Therefore, with this additional briefing and the explicit reference to the Court's criteria for disqualifying voter approval found in

the *Bickel* factors, I renew the requests in my Petition for a Rule setting aside the election on those two ballot questions, and ordering the Larimer County Clerk not to count the ballots with respect to those ballot questions and not to certify the election returns thereon.

## MERITS OF THE UNDERLYING CONTEST

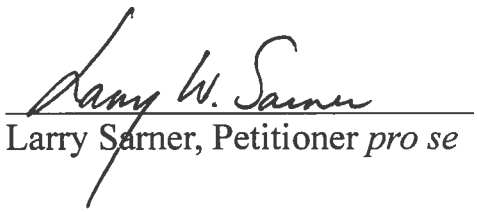
It is within the discretion of the Court to decide questions of law relating to important matters of public policy in original proceedings. The underlying contest presented such questions and were fully briefed in my original petition below and in my present Petititon for Rule. Although the primary purpose of my Petition is a Rule made absolute nullifying the elections on the City's two ballot questions as presently set, the opportunity to also issue a Rule for any of the issues of law is also present.

The questions of law that I have previously raised and briefed are presented here again for clarity. See also Petition, p. 4.

> ... *(1) that the proposed ballot language is confusing and deliberately conceals multiple questions, especially regarding tax increments; (2) that the requested exemptions to revenue and spending limitations in TABOR or "any other law" were unlawful or unconstitutional; (3) that the ballot questions ask voter approval from persons who cannot give that approval; (4) that the ballot questions ask for voter approval for increasing City debt without asking that approval from all persons who might give or withhold that approval; and (5) that the ballot question on increasing City debt asks approval for raising taxes of, or spending revenue from, taxpayers of other taxing entities without approval from those taxpayers.*

Resolution of any or all of these questions of law, or even the applicability of proceedings under CRS §1-11-203.5 for their resolution, would go far in diminishing public uncertainty over the intersection of democratic control and public finance. With this additional briefing, I renew the requests in my Petition for a Rule for resolution of these questions, and to make that Rule absolute.

**RESPECTFULLY SUBMITTED** this 7th day of October, 2016.



Larry Sarner, Petitioner *pro se*

## CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2016, the foregoing **Petitioner's Opening Brief** was filed with the Court via US Mail, certified with return receipt requested, and served on the following, by US Mail with first class postage attached:

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