



COLORADO  
MUNICIPAL  
LEAGUE

---

# Preview of 2020 State Ballot Questions and Reflections on Petitioning in a Pandemic

DAVID W. BROADWELL

CML GENERAL COUNSEL

# Eleven questions will appear on the November 3 state ballot

Deciphering what succeeded and what failed to make the ballot in the strangest of all election years

This session will cover

- National legal trends upholding state petitioning laws during the pandemic
- Key Colorado Supreme Court rulings doing the same
- How state public health orders did or did not affect petitioning at the state level in Colorado
- Key municipal-impact measures that fell by the wayside
- Six 2020 ballot questions of greatest potential interest to municipalities



COLORADO  
MUNICIPAL  
LEAGUE

# National View: Pandemic doesn't justify suspension of petitioning laws

---

- On July 30, SCOTUS stayed a ruling in Idaho that would have forced that state to suspend signature requirements or allow virtual signature gathering in contravention of state law. *Little v. Reclaim Idaho*, 591 U.S. \_\_\_, 2020 WL 4360897 (2020)
- On August 11 SOTUS likewise granted a stay on a district court decision in Oregon that would have forced the state to accept an initiative petition with half the required signatures. *Clarno v. People Not Politicians*
- Three federal circuits uphold petitioning laws in OH, AR, IL; *Thompson v. DeWine*, 959 F.3d 804 (CA6 2020); *Miller v. Thurston*, 2020 WL 4218245(CA8, July 23, 2020); *Morgan v. White*, 2020 WL 3818059 (CA7 2020)
- Other federal district courts likewise uphold state laws in AZ, CT, ND and TX.
- But compare one circuit ruling extending the petition filing deadline in MI: *SawariMedia LLC v. Whitmer*, 963 F.3d 595 (CA6 2020).



# Colorado Supreme Court requires adherence to state petitioning laws

---

- *Ritchie v. Polis* 2020 WL 3969873 (Colo. July 1, 2020)
  - The Governor does not have the authority to allow remote signature gathering on state initiative petitions due to the pandemic
  - The Governor's emergency powers do not include the ability to ignore or suspend any provision of the Colorado Constitution
  - The Colorado Constitution requires in-person signing and witnessing of signatures on state initiative and referendum petitions
- *Griswold v. Ferrigno Warren*, 462 P.3d 1081 (Colo. 2020)
  - Strict compliance, not mere "substantial compliance," is required for any state law specifying a certain number of signatures on a petition
  - Neither a court nor the SOS herself can waive or alter the signature requirement due to the pandemic



# Municipalities enjoy greater authority to alter petitioning laws than does the state

---

- The constitutional language requiring in-person signatures cited in *Ritchie v. Polis* does not necessarily apply to municipalities
- "(C)ities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation." Art. V, Sec. 1(9), Colo. Const.
- "This article shall apply to municipal initiatives, referenda, and referred measures unless alternative procedures are provided by charter, ordinance, or resolution." C.R.S. 31-11-102
- Example: the City of Boulder charter was amended in 2018 to allow the council to authorize remote signature gathering on petitions (though the City Council chose not to do so). Boulder Home Rule Charter, Sec. 38(b), 45.
- Query: Does the same flexibility exist for initiated charter amendments?



# The pandemic did not prevent Coloradan's from exercising their right to petition in 2020

---

The Safer at Home order "*imposes a significant hurdle for ballot petition circulators, who play an essential role in our democratic republic and have significant and determinative barriers due to state and local public health orders that prevent them from the normal statutory conduct of in-person signature gathering.*" Gov. Jared Polis, May 15, 2020.

Nevertheless seven initiative petitions successfully garnered in-person signatures during the pandemic:

- Late term abortion ban (48,000 cure signatures in May)
- Paid family and medical leave
- Voter-approval requirement for new state enterprises
- Reduction in state income tax rate
- Local option gaming expansion
- Two oil and gas industry measures\* (\*withdrawn after deal cut with the Governor in July)



# Key state petition efforts that fell by the wayside during the pandemic

---

- The proponents of several notable petitioning efforts cited the pandemic (along with their inability to utilize remote signature gathering after the supreme court ruling in *Ritchie v. Polis*) as their reason for suspending their efforts. Of greatest interest to municipalities:
  - Initiated statute to impose a 1% residential growth cap on all front range counties
  - Initiated constitutional amendment to dramatically change state and local petitioning laws
  - Reprise of initiated statute to impose 2500-foot setback on oil and gas wells
  - Initiated constitutional amendment to adopt graduated state income tax and authorize a \$2.5 billion state income tax increase



# Key measures to watch on the November 2020 state ballot

---

Of the eleven statewide ballot questions appearing on the November 3 ballot, the following are probably of greatest interest to municipalities:

- Repeal of the Gallagher Amendment (Amendment 76)
- Tobacco, nicotine and vaping products tax increases
- Minimum qualifications for voting
- Local option for gaming expansion
- Paid family and medical leave
- Voter approval requirement for new state fee-based "enterprises"





# Repeal of the Gallagher Amendment (Amendment 76)

---

- The 1982 Gallagher Amendment requires that residential property owners throughout Colorado bear the burden of paying no more than 45% of the total property taxes collected statewide. Art. X, Sec. 3(2), Colo. Const.
- Due to the massive run-up in residential property value since 1982, mill levies are now applied to only 7.15% of the actual value of a residential property statewide in order to stay under the 45% Gallagher cap. The residential assessment ratio is projected to decline to 5.88% next year.
- Adoption of Amendment 76 will stabilize the property tax base for local governments by preventing further automatic reductions in the residential assessment rate, will prevent growing disparities in the tax burden on commercial properties as compared to residential properties, but will also cause residential owners to bear a larger share of property taxes in the future.
- Some municipalities are also referring their own "de-Gallagher" questions to the November 2020 ballot.



# Tobacco, nicotine and vaping products tax increase

---

- A referred \$294 million state tax increase, and the first state tax ever specifically aimed at vaping products
- While most of the revenue will be devoted to education and health programs, a small percentage in the first three years of implementation will be earmarked for housing programs and tenant assistance
- The measure will basically triple the amount of state tax on a pack of cigarettes and impose for the first time a minimum sales price of \$7.00 on a pack of cigarettes.
- The measure preserves the 27% local share of cigarette taxes, C.R.S. 39-22-623
- The measure preserves local authority to tax and regulate nicotine products, as confirmed last year in HB 19-1033



# Minimum qualifications for voting

---

- This initiated measure would amend Art. VII, Sec. 1, Colo. Const., to absolutely require U.S. citizenship as a qualification for voting in Colorado. Proponents stated that one objective of the measure was to prevent "liberal cities" from extending voting rights to non-citizens.
- The measure does not, however, amend Art. XX, Sec. 6 which empowers home rule municipalities to control their own elections. Traditionally, when a constitutional amendment intends to override home rule authority, it must expressly say so.
- The measure incidentally requires a minimum age of 18 to vote.
- Telluride allows "persons holding a permanent alien registration card" to vote in town elections
- In 2018, Golden referred a charter amendment that would have allowed 16-year olds to vote in town elections, but the measure failed.



# Local option for gaming expansion

---

- This measure will allow voters in Black Hawk, Central City and Cripple Creek to expand both the types of games and the betting limits in the casinos in each of their communities
- Most of the new tax revenue derived from expanded gambling will go to community colleges, as was true in a previous 2008 measure that raised the ceiling on "limited stakes" gambling
- But the three gambling towns along with the counties in which they are located (Teller and Gilpin) will receive 22% of the new tax revenue



# Paid family and medical leave insurance program

---

- This referred statute will establish a statewide program providing for 12 weeks of paid family and medical leave, with premiums paid 50/50 by employers and employees
- Municipal employers will be included, but with the ability to opt out
- Even in municipalities that opt out, individual employees may choose to participate in the program by authorizing payroll deductions that will enable the employee to take paid leave in accordance with program requirements
- If this measure passes, it may render the recent paid sick leave mandates adopted by the General Assembly (SB 20-205) redundant. Municipalities are fully bound by the new sick leave statute adopted by the General Assembly



# Voter approval requirement for new state enterprises

---

- This initiated statute will prevent the state, absent voter approval, from creating any new fee-based "enterprises" that are anticipated to garner at least \$100 million in revenue in the first five years.
- Although applying only to the state, this measure will be of interest to municipalities that sometimes directly or indirectly benefit from state enterprises, for example the transportation enterprises created in 2009 and funded with motor vehicle registration fee increases to finance road and bridge improvements throughout Colorado. *TABOR Foundation v. Colorado Colorado Bridge Enterprise*, 353 P.3d 896 (Colo. App. 2014)
- The state has used "enterprises" in the past to shelter revenue and thereby avert TABOR refunds. But due to the steep economic recession, current revenue estimates show the state \$2.7 billion below their TABOR cap in FY 20-21, thus reducing any immediate motivation to create new enterprises.





Questions?



COLORADO  
MUNICIPAL  
LEAGUE



THANK YOU



COLORADO  
MUNICIPAL  
LEAGUE