COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2017-2018 #20

MOTION FOR REHEARING

On behalf of Chad Vorthmann, registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing for Initiative 2017-2018 #20 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

I. THE TITLE BOARD LACKS JURISDICTION BECAUSE OF NUMEROUS ERRORS IN THE PROPOSED MEASURE, INCLUDING THE FAILURE TO DENOTE CHANGES THE MEASURE WOULD MAKE TO EXISTING LAW.

The Title Board should deny jurisdiction to consider this measure because it fails to show the central, and most substantial, change being made to current law, and grossly fails to meet the drafting requirements of section 1-40-105(4). Without a new draft being submitted for review and comment, the proposed measure will without question mislead voters about the statutory changes being made and confuse them about the measure's ultimate effects. *See* C.R.S. § 1-40-105(3) ("To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters."); C.R.S. § 1-40-105(4) (noting that the final draft is the one submitted to the Secretary of State for printing).[1]

a. The proposed measure fails to show changes to existing law.

The heart of this measure is to dramatically increase (by 100% - 350%) the severance tax rate on oil and gas production. But neither the original draft submitted for review and comment nor the final version submitted to the Title Board show this change. Both the original and final version simply state in section 39-29-105(1)(b) of Section 2:

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

[1] At the April 19, 2017 Title Board hearing, the Title Board considered a number of these errors but eventually voted 2-1 in favor of jurisdiction to set title.

$300,000 and over	10%

Unlike the measure's other proposed changes that are indicated in capital letters, the drafts do not mark or otherwise indicate that the tax rates listed above have been significantly increased from 2%, 3%, 4% and 5%, respectively. Not only are these increases significant, ranging from 100% to 350%, 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 to know that the percentage rates listed are being changed because the changes simply are not marked in any way.

In addition, the tax rates added in section 39-29-105(1)(c) of Section 2 of the final draft are new and were not part of the original draft, but likewise are not marked in any way as such (through capital letters or otherwise). Thus, again, a person asked to sign the signature petition or a voter considering the measure will not know that the measure adds these new tax rates to law. In fact, because the text is not in capital letters, unlike the text for the other changes the measure makes to existing statutes, a voter is *more likely* to think that these percentage rates already exist in statute.

Indeed, the confusion created by these drafting errors (whether intentional or otherwise) played out at Title Board's April 19 hearing.[2] The draft of the title presented at the hearing stated that measure would increase "the existing severance tax on oil and gas by 5%." One of the Proponents argued that the title should say "10%" instead. Because the drafts of the measure did not show what changes were made to the rates, the Title Board struggled to determine what number to place in the title. In fact, the issue was clarified only when one Title Board member resorted to looking up the rates in current statute and confirmed that the measure would increase the existing rates by 5 <u>percentage points</u> (not 5%).[3]

Because the heart of this measure is the increase in severance tax rates, the failure to properly mark these proposed changes and additions to the rates will inevitably mislead voters and cause confusion. Voters reading the current draft of the proposed measure cannot accurately determine what changes would be made to the percentage rates of gross income. Therefore, because the text of the measure does not denote the changes to, and additions of, percentage rates of income that

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[2] Audio of this discussion begins at 1:04:40 in "Title Board – April 19, 2017 – 9:30 a.m." in this link: https://www.sos.state.co.us/pubs/info_center/audioArchives.html

[3] A similar confusion occurred at the review and comment hearing, where legislative council questioned the Proponents' intent for the tax rate changes because legislative council did not know, absent a strikethrough, what the Proponents wanted the tax rates to be. Audio of this discussion begins at 24:15 in "Initiative 2017-2018 #20 Review and Comment Hearing" in this link: http://leg.colorado.gov/committee/granicus/964136.

form the basis for the oil and gas tax, the measure should be returned for further drafting.

b. The proposed measure's amended draft fails to comply with Section 1-40-105(4).

The Proposed Measure's amended draft fails to comply with section 1-40-105(4)'s requirement that, after the review and comment hearing, the Proponents must submit "a copy of the amended draft with changes highlighted or otherwise indicated." Although the Proponents literally highlighted in the amended draft the sections where some of the changes were made between the proposed measure's original draft and its final draft, the amended draft does not indicate in any manner what changes were actually made. Moreover, the Proponents did not highlight sections where other changes were made, and the final draft still contains numerous typographical errors. Therefore, as one Title Board member voted at the April 19 hearing, the Title Board lacks jurisdiction and this proposed measure should be returned for further drafting.

First, section 1-40-105(4) expressly requires that changes made from the original draft to the final draft must be "highlighted or otherwise indicated" in an amended draft submitted to the Title Board. The necessity of this requirement is obvious: the Title Board and the public must be able to discern what changes were made after the review and comment hearing to ensure that the measure being considered by the Title Board has been subjected to the review and comment process. Although the Proponents literally highlighted the places in the draft where some of the changes were made, the changes actually made were not shown in such a way that anyone reading the amended draft would reasonably know the exact changes made between drafts. Therefore, the Proponents failed to meet both the text of, and the purpose behind, section1-40-105(4).

Second, the amended draft fails to indicate that the following substantive changes, as opposed to mere typographical changes, were made to the measure's final draft:

- The deletion of "C.R.S., AND LOCAL DISTRICT COLEGES [SIC] AS DEFINED BY SECTION 23-72-121.5, C.R.S, AND LOCAL DISTRICT COLLEGES AS DEFINED BY SECTION 23-72-212.5," in Section 5 of the proposed measure, and

- The addition of "AND ENVIORNMENT [SIC]" in Section 5 of the proposed measure;

Likewise, new subsection titles that changed from the original draft to the final draft and 11 corrected typographical errors are not indicated in capital letters or marked as changed in the amended draft.

Third, there are at least 4 typographical errors that still need correction, including the misspellings of "establishing," "guidelines," and "environment," and a missing comma in section 39-29-110.5(2)(III) of Section 5 of the measure.

Therefore, when taken collectively, if not individually, the proposed measure's numerous violations of section 1-40-105(4) unquestionably warrant a return of the proposed measure to the Proponents to correct these deficiencies and for a new review and comment hearing before being reconsidered by this board.

c. Changes made after the review and comment hearing are so substantial that the final draft constitutes a new measure not subjected to review and comment.

Section 1-40-105(1) requires that the original draft of a proposed measure must be submitted for review and comment.[4] The Colorado Supreme Court has interpreted this statutory section to mean that when "the adoption of language in a subsequent draft of a proposal [] substantially alters the intent and meaning of central features of the initial proposal," "the revised document in effect constitutes an entirely different proposal" and "must be submitted to the legislative offices for comment."[5] . The Court elaborated on the purpose behind this requirement:

> The public's right to understand the contents of an initiative in advance of its circulation would be completely eradicated if the intent and meaning of the central features of a proposal submitted to the

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[4] This requirement is different than the requirement in C.R.S. § 1-40-105(2), which states that "[i]f any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition must be resubmitted to the directors for comment in accordance with subsection (1) of this section." Objector Vorthmann is arguing here that the changes made to the measure's final draft are so substantial that they constitute an entirely new measure that must be resubmitted to for review and comment. He is not arguing that these changes are not in direct response to comments made at the review and comment hearing.

[5] *See In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P.2d 963, 968 (Colo. 1992) (noting that the proposed measure at issue was originally intended to permit limited gaming only in the city of Idaho Springs until the subsequent draft substantially altered this central feature to apply to cities outside of Idaho Springs).

> Board for the purpose of fixing a title thereto is substantially different from the intent and meaning of the central features of an earlier version thereof that was submitted to the legislative offices.

Id.

Like the subsequent draft in *In re Limited Gaming*, the final draft for Initiative #20 contains substantial alterations that fundamentally modify the measure and thus require a new review and comment hearing. The final draft of Initiative #20 adds various new taxes on oil and gas that are to apply starting January 1, 2018. The tax rates on oil and gas are not simply a "central feature," they are the heart of the measure. The addition of these new tax rates constitute a substantial change from the original draft, which substantially increased the tax on oil and gas for gross incomes under $300,000 before January 1, 2018, but did not tax oil and gas at all for those gross income levels starting on January 1, 2018. The measure's original draft included only a tax rate for gross income of $300,000 and over starting on January 1, 2018. In other words, a small oil or gas producer who read the original draft and saw that its tax rate was zero starting on January 1, 2018, would be more than surprised to learn that the final draft completely reversed course and states that its tax for after January 1, 2018 could be more than triple its current tax rate. This substantial change requires that the measure be returned for additional review and comment.

d. Other changes made to the proposed measure after the review and comment hearing are substantial and not in direct response to comments made at the hearing.

Section 1-40-105(2) specifies that "[i]f any substantial amendment is made to the petition [after the review and comment hearing], other than an amendment in direct response to the comments of the directors of the Legislative Council and the office of legislative legal services, the amended petition must be resubmitted to the directors for comment . . . ." Initiative #20 violates this subsection because its final draft removes a proposed addition to section 24-75-1201 that would place some of the money from the severance tax into a clean energy fund.

At the review and comment hearing[6] and in Question 21 of the review and comment memorandum, the proponents were told that that section 24-75-1201 was repealed, but that there is a similar clean energy provision in section 24-38.5-102.4(1)(a)(I). The memorandum specifically asks: "Does the proponent wish to amend this existing section?" But rather than simply correcting this statutory cross-reference, the Proponents deleted the reference altogether, and instead

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[6] *See* starting 52:38 during the review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

elected to increase by 10 percentage points education funding in section 39-29110.5(2)(I) of Section 5 in the final draft. That change cannot be said to be in direct response to the comment that merely proposed changing the statutory citation to the correct clean energy provision. Instead, it constitutes a fundamental change to the measure and to the programs funded by the tax increase. Thus, the measure must be returned for additional review and comment and the public notice provided thereby.

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

The proposed measure is simply so vague and confusing that the Title Board cannot reasonably understand it and set a title it without guessing what it means. For example, after the percentage rates of gross income listed in Section 2 of the proposed measure under C.R.S. § 39-29-105(1)(c) is a percentage rate in all capital letters that states "$300,000 AND OVER 10% OF TOTAL GROSS INCOME." Just above that text are the percentage rates, the last of which states "$300,000 and over 10%." Based on its appearance, this duplication in language suggests that the proposed measure would change the rate to apply to "TOTAL GROSS INCOME," rather than just "gross income" mentioned in the body of C.R.S. § 39-29-105(1)(c), because "TOTAL GROSS INCOME" in capitalized. This likely voter interpretation, however, is incorrect. The proposed measure merely states the percentage rate for gross income $300,000 and over is 10% twice, and this duplication necessarily will cause voter confusion. Moreover, the fact that "$300,000 AND OVER 10% OF TOTAL GROSS INCOME" is capitalized, but the rest of the percentage rates are not, suggests that the rest of the percentage rates are not changed from the current statute, when in fact they would be added to statute.

Legislative Council likewise struggled to understand the measure and asked a variety of clarifying questions. The Proponents either did not answer these questions or answered them in such a manner as to cause even greater confusion. For example:

1. Question 3.a asked: "The tax that is levied under [section 39-29-105(1)(b)] will apply for tax years that begin prior to January 1, 2018. Is this correct?" The Proponent responded by stating that if the question is whether this applies retroactively, the answer is "no," but later stated that he "want[s] [the measure] to apply to 2017."

2. Question 3.c. asked: "If voters approve the measure in November 2017 and it becomes effective after January 1, 2018, then would the change be

retrospectively changing the taxes for 2017?"[7] The Proponent first responded "no," but then changed his answer to "would it?" After Legislative Council responded that the measure's language indicated that the measure would in fact retrospectively change taxes starting in 2000, the Proponent changed his answer to "yes." Whether the measure would retrospectively change taxes is a vitally important question, and if the measure would retrospectively change taxes, then the Title Board should have included the measure's retrospective effect in the title (as discussed further below).

3. Question 6 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. 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).[8] Whether the measure "deBruces" all or some of the tax revenue is a significant issue that must be included in the title, but only if the measure can be clearly understood. It cannot.

4. Question 8 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?[9] The Proponent responded that he "d[oesn't] know what that question meant," 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. Such an important effect needs to be in the title, but again, only if it can be understood.

5. Question 12 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?" The Proponent said he thinks the answer is 2018, but he did not provide a definitive answer.

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[7] *See* starting 31:30 during the review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.
[8] *See* starting 35:20 during the review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.
[9] *See* starting 37:45 during the review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

6. Question 13 asked: "Is there any circumstance that you intend the corpus of the perpetual base account to be used?"[10] The Proponent responded by asking "what is the answer here?" and then agreed with Legislative Council's suggested answer of "no."

In light of these and other questions that were not definitively answered and/or addressed through later drafting, there remain too many unresolved issues for the Title Board to set a title. In fact, at least one of the Title Board members mentioned at the April 19, 2017 Title Board hearing that she used as a basis the title of a similar measure from 2008 in suggesting the addition of "interest owners" to the part of the title concerning a tax credit and in suggesting other revisions to the title, which indicates that the Title Board struggled in determining how to draft a title for this incomprehensible measure.[11]

III. INITIATIVE #20 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

The Proponent stated at the April 19, 2017 Title Board hearing that the single subject of the measure is a "severance tax." But the measure actually contains multiple separate subjects including at least the following:

1. Changing the severance tax.

2. Establishing minimum amounts of education funding. The Proponent stated during the review and comment hearing that the revenue from the increased severance tax would supplement existing funding and would establish minimum amounts of funding for public education and higher education.[12] This would force the funding provided to schools through the Public School Finance Act of 1994 to be held constant, which is a substantial change that constitutes a second subject.

3. Exempting not only state-level spending limits from TABOR but also "deBrucing" district-level limits by allowing voters from the state to approve a voter-approved revenue change for individual districts.

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[10] *See* starting 45:00 during the review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

[11] Audio of this discussion begins at 1:09:20 in "Title Board – April 19, 2017 – 9:30 a.m." in this link: https://www.sos.state.co.us/pubs/info_center/audioArchives.html

[12] *See* starting 19:42 during the review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

IV. THE TITLE MISDESCRIBES THE MOST IMPORTANT ASPECT OF THE MEASURE, INCLUDES MISLEADING STATEMENTS, AND IS INACCURATE BECAUSE OF ERRORS IN THE FISCAL IMPACT STATEMENT.

1. The title states that it "increase[es] the existing severance tax rates on oil and gas by 5%." This statement is misleading. The measure actually increases the tax rates by 100% - 350%, depending on production, and should state as such.

2. The title fails to mention the proposed measure's apparent retroactive effect, including that the measure would retrospectively change taxes for the years 2000-2017, as noted both by the legislative staff and in the Fiscal Impact Statement.

V. THE ESTIMATE IN 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. Therefore, the abstract is misleading under section 1-40-107(1)(a)(II)(B), and 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 DOES NOT FACTOR IN THE FULL EXTENT OF THE MEASURE'S RETROACTIVE EFFECT.

a. The abstract does adequately detail the proposed measure's economic impacts.

Section 1-40-105.5(3)(b) requires that the abstract must include "[a]n estimate of the measure's economic benefits for all Coloradans." (Emphasis added). The proposed measure's abstract, however, includes only vague statements as to what some of the potential economic impacts "may" or may not be. For example, the abstract states that additional government spending "may increase access to [local government] services and may reduce the amount of money households need to budget for these services." Or, apparently, it may not. The public is not told which is correct or even more likely to be correct. The Title Board should demand more.

Additionally, 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 reduce profits for oil and gas companies." These statements are hypotheticals and provide no meaningful information for voters. Rather than a statement that there could be less oil and gas employment, the abstract should state whether there actually will

be less oil and gas employment or provide possible scenarios, or if a definitive answer is not possible, what outcome is more likely given their economic analysis. Instead, the Fiscal Impact Statement 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. The severance tax increases certainly will cause behavioral responses, 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 the Legislative Council for reconsideration.

b. The abstract does not factor in the full extent of the proposed measure's retroactive effect.

The Proponents, Legislative Council, and the drafters of the Fiscal Impact Statement all agree that the measure would retrospectively change taxes for the years 2000-2017, which presumably would require the State to collect the increased amount. Despite this consensus, the Fiscal Impact Statement oddly goes on to state that it "assume that the measure only applies to severance taxes paid for the tax year 2017 which are filed in April of 2018." The drafters Fiscal Impact Statement may have made this assumption based on a judgment of constitutionality, but such an assumption is inappropriate at this stage. The Fiscal Impact Statement should have factored in the retrospective change, which would have significantly altered its estimates. Therefore, not only are the abstract's estimates inaccurate but the abstract fails to comply with section 1-40-105.5(3)(b)'s requirements because, by not including the retrospective effect, the abstract does not "estimate[] the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted." It must be returned to the Title Board for revisions with the help of the director of research of the legislative council.

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 26th day of April, 2017.

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