COLORADO TITLE BOARD

In the Matter of:

TITLE, BALLOT TITLE & SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2019-2020 # 108: "PROHIBITION ON LATE-TERM ABORTIONS"

MOTION FOR REHEARING

In accordance with C.R.S. § 1-40-107 (1) (a) (I), and by and through undersigned counsel, Colorado registered electors Sarah Taylor-Nanista and Jack Teter (the "**Movants**") hereby request a rehearing before the Colorado Title Board (the "**Board**") with respect to Proposed Initiative 2019-2020 No. 108, regarding "Prohibition on Late-Term Abortion" (the "**Initiative**"). As set forth below, Movants respectfully object to the title, ballot title, and submission clause approved by the Board based upon the following:

I. BACKGROUND

Following a hearing held July 3, 2019, the Board designated and fixed the following title for the Initiative:

> A change to the Colorado Revised Statutes concerning prohibiting an abortion when the probable gestational age of the fetus is at least twenty-two weeks, except when required to save the life of the pregnant woman, and, in connection therewith, defining terms related to the measure including abortion, probable gestational age, and twenty-two weeks; making it a felony to perform or attempt to perform a prohibited abortion; requiring the Colorado medical board to suspend the license of a physician whom the board finds performs or attempts to perform a prohibited abortion; specifying that a woman on whom an abortion is performed may not be charged with a crime in relation to a prohibited abortion; and excepting medical procedures relating to miscarriage or ectopic pregnancy.

Likewise, the Board designated and fixed the following ballot title and submission clause:

> Shall there be a change to the Colorado Revised Statutes concerning prohibiting an abortion when the probable gestational age of the fetus is at least twenty-two weeks, except when required to save the life of the pregnant woman, and, in connection therewith, defining terms related to the measure including abortion, probable gestational age, and twenty-two weeks; making it a felony to perform or attempt to perform a

prohibited abortion; requiring the Colorado medical board to suspend the license of a physician whom the board finds performs or attempts to perform a prohibited abortion; specifying that a woman on whom an abortion is performed may not be charged with a crime in relation to a prohibited abortion; and excepting medical procedures relating to miscarriage or ectopic pregnancy?

(together, the "**Title**").

II. GROUNDS FOR RECONSIDERATION

A. The Title omits material features of the Initiative, does not fairly and accurately represent the Initiative's true intent and meaning, and may confuse and mislead voters.

A measure's title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. *See* C.R.S. §1-40-106(3)(b). The title and submission clause should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal. *In re Title, Ballot Title & Submission Clause for 2009-2010 No. 45,* 234 P.3d 642, 648 (Colo. 2010). "[A] material omission can create misleading titles." *In re Title, Ballot and Submission Clause 1999-2000 #258A,* 4 P.3d 1094, 1098 (Colo. 2000).

1. The initiative provides no exception to its criminalization of physicians who perform, or attempt to perform, abortions beyond the twenty-second week of pregnancy. Rather, proposed Section 18-6-903 (3) provides an "Affirmative Defense" under the following, expressly defined circumstances:

> **Affirmative Defense.** If, in the reasonable judgement of the physician, an abortion is immediately required, rather than an expedited delivery of the fetus, to save the life of a pregnant woman that is threatened by a physical disorder, physical illness, or physical injury, not including psychological or emotional conditions, such an abortion is not unlawful.

An affirmative defense is not an exception that excludes conduct from the scope of a criminal offense. To the contrary, an affirmative defense functions as, in essence, acknowledgement of prohibited conduct, could with an assertion of facts that excuse the criminal liability that would otherwise attach. *See, e.g.*, People v. Hill, 934 P.2d 821, 826 (Colo. 1997). Only after a court determines as a matter of law that a criminal defendant has introduced credible evidence to support such a defense does the prosecution bear the burden of disproving it. *See, id.*

As fixed by the Board, the Title will undoubtedly lead voters to believe that a physician who performs a mid-pregnancy abortion to protect a woman from death will be protected from prosecution. As the express terms of the Initiative make clear, however, this is not the case. Rather that physician may be arrested, jailed, charged with a class three felony, and brought to

trial. Should a court find, in its discretion, that the physician has failed to produce sufficiently credible evidence on any of the multiple elements included in the Affirmative Defense, the physician may be convicted and sentenced to imprisonment for a term of twelve years. Nothing in the Title provides voters notice that a "yes" vote will bring about this result.

The Title is all the more clearly misleading in that it uses the terms "except" and "excepting" in reference to two materially different provisions of the Initiative. First, as described above, the Title mislabels the Affirmative Defense as an "exception." Second, the Title references the actual exceptions the Initiative recognizes for treatment of a miscarriage or of an ectopic pregnancy. Suggesting to voters that these two provisions operate identically is both factually inaccurate and likely to mislead voters as they attempt to determine what they are voting for or against.

As the May 31, 2019 Memorandum (the "**Memorandum**") directed to the proponents by Legislative Council Staff and the Office of Legislative Legal Services following their review and comment meeting makes clear, the proponents intended that their Initiative include an affirmative defense, and not an exception. At page 6, section 14, the Memorandum states:

> 14. Is the conduct listed in proposed section 18-6-902 (3) an exception, or is it an affirmative defense? An exception requires that the prosecutor or court dismiss charges before trial when the elements are met, while the defendant is required to prove the elements of an affirmative defense.

Given that the proponents revised their June 7, 2019 final draft of the Initiative to replace the heading "Exception" with the heading "Affirmative Defense," their intent is made clear by the express terms they chose. In accordance with the directives of the Colorado Supreme Court, therefore, the Board must assure that this intent, which is material to an understanding of the Initiative, is reflected in the title it sets. The Title does not meet this standard and should, therefore, be reconsidered.

2. The Initiative materially alters the existing definition of the term "abortion" as it presently exists in Colorado law. At present, Colorado defines abortion in only one statutory provision. C.R.S. § 13-22-703 states that "abortion" means "the use of any means to terminate the pregnancy of a minor with knowledge that the termination by those means ***will, with reasonable likelihood, cause the death of the minor's unborn offspring."***

By sharp contrast, the Initiative first defines the term "abortion" to mean "the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means ***with the intent to kill the unborn child of a woman known to be pregnant."*** Proposed Section 18-6-902 (1). The Initiative then modifies this definition by expressly requiring that, in order to have the benefit of the Affirmative Defense, a physician must "terminate a pregnancy in the manner which, in reasonable medical judgment, ***provides the best opportunity for the fetus to survive. . . .***" *See* Proposed Section 18-6-903 (4) ("Provision for Survival"). This internally inconsistent definition of the term "abortion," requiring both the intent to bring about the demise of a fetus

and employing means that provide the best opportunity for fetal survival is distinctly, and materially, different than the existing definition of that term. It is also flies in the face of any accepted and medically accurate definition of medically safe abortion care and is, therefore, likely to be highly controversial. Nowhere, however, does the Title put voters on notice that this substantial change in law will result from a "yes" vote.

In 1990, the Colorado Supreme Court addressed a similar deficiency in the titles fixed for a proposed initiative that, like the Initiative here, intended to limit access to abortion care. *See In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, (Colo. 1990). That initiative defined the term "abortion" to mean "a procured abortion, whether or not payment is involved, by the use of any means to terminate the pregnancy with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the minor child's unborn offspring at any time after fertilization." *Id.* at 239. The titles fixed the Board, however, made no reference to this definition. The Court unanimously concluded that that Board erred in its failure to put voters on notice that a "yes" vote would result in adoption of this new, medically inaccurate, and controversial legal standard that recognized pregnancy to begin at fertilization. *See id.* at 242.

The Title here suffers almost precisely the same flaw as that identified in the parental notification initiative. It makes no mention of the fact that the Initiative, if adopted would impose a medically inaccurate, and practically impossible, definition of "abortion," requiring that a procedure intended to terminate a pregnancy without producing a live birth be performed in a manner intended to optimize the likelihood of a live birth. Absent express reference in the Title, there is little, if any, reason to believe that voters considering the Initiative could understand that voting "yes" would facilitate this result. The Title is therefore deficient and should be reconsidered.

3. Although the Initiative includes the Affirmative Defense, that defense is not applicable whenever a pregnant woman's life is in danger, but only in limited and expressly defined circumstances. The Title, however, make no mention of this material feature of the Initiative.

As set forth above, the Affirmative Defense becomes available, if at all, only when a physician has determined that an abortion is "immediately required" and when a woman is suffering a *physical* disorder, illness, or injury. The fact that a woman suffers from mental illness that puts her life in jeopardy is, according to the proponents, of no concern. Likewise, the fact that a woman is unlikely to die absent immediate provision of an abortion, yet will be at risk of death if her pregnancy continues to term, excludes access to the Affirmative Defense and, thus, to mid-pregnancy abortion care.

Both the requirement that a physician may only proceed where her patient will die absent immediate intervention, and the exclusion of mental illness as a cause of life-threatening circumstances, radically alter existing Colorado law regarding the availability of abortion care. Yet, the Title makes no mention of this material feature of the Initiative. It thereby deprives

voters of a clear understanding of what their votes in the affirmative could cause and, as a consequence, the Title should be reconsidered.

B. The Initiative impermissibly addresses multiple subjects.

The Initiative addresses at least two separate and distinct subjects. It is therefore prohibited by article V, section 5 of the Colorado Constitution and the Board should decline to fix a title for it.

Each initiative that proposes an amendment to the State Constitution shall contain only one subject, clearly expressed in the title set for that initiative. *See* Colo. Const. Art. V., § 1(5.5) (the "Single Subject Rule"); *see* also C.R.S. § 1-40-106.5 (single-subject requirements for initiated measures); *In re Title, Ballot Title, Submission Clause,* 974 P.2d 458, 463 (Colo. 1999) (proposed initiative violates single subject rule where it "has at least two distinct and separate purposes which are not dependent upon or connected with each other.").

The Movants agree with the Memorandum, which states at page 1, under the heading "Purposes":

> The ***major purposes*** of the [Initiative] appear to be:
>
> **1.** To make it unlawful for a person to perform or attempt to perform an abortion if the gestational age of the fetus is at least twenty-two weeks [and]
>
> **2.** To define unprofessional conduct by a physician to include performing or attempting to perform an abortion when the gestational age of the fetus is at least twenty-two weeks.

In a nutshell, the Initiative seeks to create a high-level felony, punishable by a lengthy term of imprisonment, with which to charge and convict physicians who provide medically indicated care to their patients. Separately, the Initiative seeks to amend the Colorado Medical Practice Act through the addition of a new definition of "unprofessional conduct," together with a mandatory sanction.

The Single Subject Rule prohibits attempts to roll together multiple subjects in order to attract the votes of those who would favor one of those subjects, but would oppose the others. *See, e.g., In re Proposed Initiative for 2005-2006 #74,* 136 P.3d 237, 242 (Colo. 2006); *In re Proposed Initiative for 1997-1998 #84,* 961 P.2d 456, 458 (Colo. 1998). The Initiative combines the two subjects identified in the Memorandum, potentially attracting voters who might support the Initiative, even though they support only one. Specifically, some voters may favor imposing professional discipline upon a physician who performs a mid-pregnancy abortion under some of the circumstances described in the Initiative, but would not vote for the criminal provision

standing alone. Therefore, the Board should determine that the Initiative violates the Single Subject Rule and that a title cannot be set for it.

Respectfully submitted this 10th day of July, 2019.

RANGE PC

By: _____

Kevin C. Paul, Atty Reg. No. 20941
Range PC
600 Grant Street, Suite 650
Denver, Colorado 80203
Phone Number: (303) 376-3704
FAX Number: (303) 595-4750
E-mail: kevinpaul@range.law

ATTORNEYS FOR MOVANTS SARAH TAYLOR-NANISTA AND JACK TETER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of July, 2019, a true and correct copy of the **MOTION FOR REHEARING** was filed with the Colorado Secretary of State and served via U.S. mail, postage prepaid, to the following:

Erin Behrens
3440 Youngfield St. #283
Wheat Ridge, CO 80033
Designated representative

Giuliana Day
3440 Youngfield St. #283
Wheat Ridge, CO 80033
Designated representative

_____