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COLORADO TITLE BOARD

In the Matter of:

TITLE, BALLOT TITLE & SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2019-2020 # 116: "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 John Teter (the "**Movants**") hereby request a rehearing before the Colorado Title Board (the "**Board**") with respect to Proposed Initiative 2019-2020 No. 116, regarding "Prohibition on Late-Term Abortions" (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 August 21, 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 the abortion is immediately required to save the life of the pregnant woman when her life is physically threatened, and, in connection therewith, defining terms related to the measure including "abortion," "probable gestational age," and "twenty-two weeks"; requiring a pregnancy terminated after twenty-two weeks to be performed in a manner that provides the best opportunity for the fetus to survive, unless it poses a greater risk of death to the pregnant woman; 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 the abortion is immediately required to save the life of the pregnant woman when her life is physically threatened, and, in connection therewith, defining terms related to the measure including "abortion," "probable gestational age," and "twenty-two weeks"; requiring a pregnancy terminated after twenty-two weeks to be performed in a manner that provides the best opportunity for the fetus to survive, unless it poses a greater risk of death to the pregnant woman; 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 medical 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 who 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, 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 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 July 15, 2019 Memorandum (the "**116 Memorandum")** directed to the proponents by Legislative Council Staff and the Office of Legislative Legal Services (collectively "**Staff**") in conjunction with their review and comment meeting acknowledges, the Initiative is essentially identical to proposed initiative 2019-2020 #108 ("**Number 108**"), which proponents also proposed and submitted. The proponents' original draft of Number 108 included an exception, rather than an affirmative defense. In its May 31, 2019 review and comment Memorandum regarding Number 108 (the "**108 Memorandum**"), Staff posed the following question to proponents:

> 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.

108 Memorandum at page 6, section 14 (emphasis added).

After receiving the 108 Memorandum, the proponents revised their June 7, 2019 final draft of Number 108 to replace the heading "Exception" with the heading "Affirmative Defense," making their intent clear by the express terms they chose. Proponents then carried those same terms regarding an Affirmative Defense into their final draft of the Initiative. 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 . . . 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 the 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 also flies in the face of any accepted and medically accurate definition of 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 -- one that will make provision of a mid-pregnancy abortion all but impossible without threat of prosecution -- will result from a "yes" vote. *See In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990) (Title Board engaged in reversible error by failing to adequately advise voters of substantial and controversial change in definition of "abortion."). 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. Moreover, the Affirmative Defense is, by its express terms, unavailable where a patient suffers a life-threatening physical disorder, illness, or injury in conjunction with "psychological or emotional conditions." 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 only when a woman is suffering a *physical* disorder, illness, or injury that is *not* accompanied by psychological or emotional conditions. *See* Proposed § 18-6-903 (3) (Affirmative Defense applicable only where pregnant woman "is threatened by a physical disorder, physical illness, or physical injury, not including psychological or emotional conditions."). 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. Finally, only where a woman's life-threatening ailment or injury does not include some form of psychological or emotional condition may her treating physician even consider providing her a life-saving, mid-pregnancy abortion. Thus, a patient diagnosed with a potentially terminal malignancy during the twenty-third week of her pregnancy

who is also under the care of a treating psychiatrist for clinical depression would have no access to a lawful abortion, even where carrying her pregnancy to term could result in her death.

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, or an accompaniment to, 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.

4. The Title fails to adequately advise voters as to the circumstances under which individuals, including non-physicians and women seeking abortion care, are subject to prosecution under the Initiative.

a. The Initiative would impose felony sanctions not only where a physician "performs" or "induces" an abortion, but also where a physician "attempts to perform or induce an abortion." Existing Colorado criminal law explains that a person commits "criminal attempt" where, acting with the required state of mind, the person takes "a substantial step toward the commission of the offense." *See* C.R.S. § 18-2-101 (1). Thus, a physician who set an appointment to provide a patient a mid-pregnancy abortion; performed an ultrasound examination and interpreted the results; drew and analyzed the patient's blood; set an intravenous line; and did nothing more would be just as culpable – and subject to the same prison term – as a physician who terminated the twenty-third week pregnancy of a patient experiencing chronic suicide ideation, but no physical illness. The Title, as set, offers voters no clue that a "yes" vote will obtain this result.

b. The Initiative would also impose felony sanctions upon *any* individual, regardless of licensure or position, who assists a physician in providing a mid-pregnancy abortion for a patient. Proposed Section 18-6-903 (5) expressly provides that:

> **[a]ny person who** intentionally or recklessly . . . **attempts** to perform or induce an abortion in violation of [the Initiative] is guilty of a Class 3 Felony.

Section 18-2 101 (2) of the Criminal Code explains that:

> [a] person who engages in conduct intending to aid another to commit an offense commits **criminal attempt** if the conduct would establish his [or her] complicity under section 18-1-603 were the offense committed by the other person, even if the other person is not guilty of committing or attempting the offense.

See id. (emphasis added). Section 18-1-603 then defines "complicity" as aiding, abetting, advising, or encouraging another in planning or committing [an] offense. *See id.*

Perhaps inadvertently, the Title, as drawn, would completely mislead voters into believing that only a physician could be the subject of prosecution, conviction, and imprisonment under the terms established by the Initiative. To the contrary, *every* person who engaged in intentional conduct that served to assist that physician in any way – from the receptionist who set the patient's appointment; to the unlicensed medical assistant who checked the patient in and reviewed her medical history forms with her; to the registered nurse who checked her blood pressure and drew her blood for testing; to the advanced practice nurse who established an intravenous line; to the certified nurse anesthetist who administered, monitored, and reversed her anesthetic treatment; to the physician assistant who monitored her post-procedure vital signs, reviewed her follow-up and after-care instructions, and discharged her from care, could, at the whim of a prosecutor, be arrested, charged, jailed, tried, convicted, and imprisoned for criminal attempt under proposed Section 18-6-903 (5). Yet, nowhere does the Title make voters aware that their "yes" vote will bring about this result.

c. The Title, as set by the Board, does not advise voters that the Initiative permits the prosecution of a woman for whom a mid-pregnancy abortion is either attempted, but not completed, or "induced," rather than "performed." By its terms, proposed Section 18-6-903 (5) states that, "[a] **woman on whom an abortion is performed** or a person who fills a prescription or provides equipment used in an abortion does not violate [the Initiative] and **cannot be charged with a crime** in connection therewith." *Id.* However, Section 18-6-903 (5) also provides for the imposition of felony punishment upon "**[a]ny person who** intentionally or recklessly performs or **induces** or **attempts to perform or induce** an abortion in violation of [the Initiative]." *Id.*

(i) In keeping with the plain and unambiguous meaning of its terms, the Initiative clearly permits the prosecution of a woman who, at twenty-two weeks and one day of her pregnancy, intentionally, or recklessly, successfully induces the termination of her pregnancy through the ingestion of an abortofacient medication she obtains via the internet after being advised that her gynecologist cannot provide a medically safe abortion for her.

(ii) Just as clearly, the plain language of the Initiative permits the prosecution of a woman who, at twenty-two weeks and two days of her pregnancy: receives test results indicating that her fetus will be born absent most of its brain and with no chance of survival; is advised by her obstetrician that, because she is healthy, she is prohibited by law from terminating her pregnancy; in response, obtains and ingests abortofacient medications with the intent to terminate her pregnancy; does not terminate her pregnancy; and gives birth at thirty-eight weeks to an infant that dies within the ensuing forty-eight hours.

Movants request the Board take note of Proposed Initiative 2019-2020 #120 ("**Number 120**"), which proponents have submitted in tandem with Initiative #116. In proponents' original draft of Number 120, they provided that "[a]ny person who intentionally or recklessly performs **or induces** or attempts to perform **or induce** an abortion . . . is guilty. . . ." *See* Proposed Number 120, Section 18-6-903 (4) (Penalties). Staff questioned this pairing of the terms

"perform" and "induce" in its July 31, 2019 review and comment Memorandum (the "**120 Memorandum**"):

> Pursuant to proposed section 18-6-903 (4), a person violating the provisions of part 9 is guilty. . . . However, the penalty applies to a person who **"induces"** or **"attempts to induce"** an abortion, as well as the performance or attempted performance of an abortion, which is the unlawful conduct described in proposed section 18-6-903 (1).
>
> > a. Does the addition of the language **"induces"** or **"attempts to induce"** expand the unlawful conduct beyond the conduct described in proposed section 18-6-903 (1)? If not, the language in the penalty provisions should be consistent with the language used to describe the unlawful act.

120 Memorandum at pp. 2-3, § 2 (a) (emphasis added). After receiving the 120 Memorandum, proponents deleted the term "induce" from the penalty provision of their final draft of Number 120.

The proponents did not, however, similarly delete the term "induce" from the Initiative. Given that proponents submitted the Initiative and Number 120 in tandem, and that both proposed initiatives were subject to review and comment, one immediately following the other, on July 31, 2019, the Board should conclude that the distinction between "performing"[1] and "inducing"[2] an abortion, retained in the Initiative, is one that the proponents intended.

The Title states that the Initiative specifies "that a woman on whom an abortion is performed may not be charged with a crime in relation to a prohibited abortion." This seemingly simple statement would completely mislead voters in the belief that pregnant women cannot be prosecuted for the felony crimes the Initiative would establish. To the contrary, the terms with which the Initiative is drafted make clear that pregnant women ***are*** subject to prosecution for inducing, or attempting to induce, a mid-pregnancy abortion. The Title must, therefore, be amended so as to advise voters of this highly controversial outcome.

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.

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[1] "Perform" means to "carry out, accomplish, or fulfill an action or task, or function." *See* Oxford Dictionary Online/LEXICO (https://www.lexico.com/en?search_filter=dictionary).

[2] "Induce" means to "bring about [birth or delivery] artificially, typically by the use of drugs." *See* Oxford Dictionary Online/LEXICO (https://www.lexico.com/en?search_filter=dictionary).

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 both the 108 Memorandum and the 116 Memorandum, which state 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 28th day of August, 2019.

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ATTORNEYS FOR MOVANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of August, 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:

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