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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

Kenneth Nova, Objector,

vs.

Amber Drevon and Charles Dukes, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2019-2020 #169

Kenneth Nova, registered elector of the State of Colorado, through his undersigned counsel, objects to the Title Board's title and ballot title and submission clause set for Initiative 2019-2020 #169, and states:

The Title Board set a title for Initiative 2019-2020 #169 on January 15, 2020. The Board designated and fixed the following ballot title and submission clause:

SHALL STATE TAXES BE INCREASED \$151.7 MILLION ANNUALLY ON CORPORATIONS IN THE FIRST FULL FISCAL YEAR, AND BY SUCH AMOUNTS THAT ARE RAISED THEREAFTER, BY A CHANGE TO THE COLORADO REVISED STATUTES THAT LIMITS CERTAIN CORPORATE TAX DEDUCTIONS IN ORDER TO OFFSET THE COSTS OF CREATING AN OUT-OF-SCHOOL LEARNING OPPORTUNITIES PROGRAM FOR COLORADO CHILDREN, AND, IN CONNECTION THEREWITH, PROVIDING PARENT-DIRECTED FINANCIAL AID TO BE USED FOR OUT-OF-SCHOOL LEARNING OPPORTUNITIES SUCH AS TUTORING, SUPPLEMENTAL INSTRUCTION IN CORE SUBJECTS, SUPPORT FOR STUDENTS WITH SPECIAL NEEDS, LANGUAGE PROGRAMS, ART AND MUSIC, AND CAREER AND TECHNICAL EDUCATION TRAINING; REQUIRING THE AWARD OF FINANCIAL AID TO PRIORITIZE LOW AND MIDDLE-INCOME STUDENTS; CREATING AN INDEPENDENT AGENCY TO OVERSEE THE PROGRAM TO ENSURE FINANCIAL ACCOUNTABILITY AND TRANSPARENCY AND TO SELECT A NONPROFIT TO ADMINISTER THE PROGRAM; ALLOWING A STATE INCOME TAX CREDIT OF 100% OF A TAXPAYER'S CONTRIBUTION TO THE PROGRAM; TEMPORARILY ELIMINATING THE NET OPERATING LOSS DEDUCTION FOR CORPORATIONS TO OFFSET THE TAX REVENUE LOSS RESULTING FROM THE INCOME TAX CREDIT; AND EXEMPTING THE INCREASED TAX REVENUE FROM ALL REVENUE AND SPENDING LIMITATIONS AS A VOTER-APPROVED REVENUE CHANGE?

I. The Title Board lacks jurisdiction over Initiative #169, as it violates the Constitution's single subject requirement.

At the initial hearing on #169 the Proponents identified the creation of an out-of-school learning opportunities program (the "Program") as the subject of the measure. The measure also provides funding for the Program through the creation of a 100% state income tax credit for any taxpayer who makes a contribution to the non-profit that would administer the Program. *See* #169, Sec. 2. While this funding mechanism may be part of the measure's single subject, its elimination of the net operating loss tax deduction (the "NOL Deduction"), found in Section 3, is not.

Additional tax revenue attributable to the measure's elimination of the NOL Deduction would benefit the State general fund, not the Program. *See* #171, Sec. 3. Presumably, Proponents will contend the connection between the measure's subject—creation of the Program—and the elimination of the NOL Deduction is that the elimination will off-set the revenue the State will lose as a result of the measure's new income tax credit. This argument fails for two reasons. First, off-setting the cost to the State is not sufficiently connected to the measure's purpose. While reducing the measure's impact on the general fund may be politically expedient and helpful to Proponents in campaigning for the measure, doing so is not necessarily or properly connected to the creation of the Program. Second, a review of the Initial Fiscal Impact Statement for the measure reveals that the revenue generated by the elimination of the NOL Deduction and the cost to the State of the measure's new income tax credit will not come close to off-setting one another. In five of the ten years analyzed by Legislative Council Staff, the difference between the two impacts is a nine-figure sum (greater than \$100,000,000). In four of the ten years, the State will have a net loss, while in six years, the state will enjoy a net gain. There is simply no correlation between the two impacts. The measure's elimination of the NOL Deduction is a second subject and deprives the board of jurisdiction to set a title for this measure.

II. Even if the Title Board has jurisdiction, the titles set are legally flawed because the titles fail to inform voters of certain central elements of the measure or misstate those aspects of the Initiative #169.

A. The titles are misleading and must be corrected in order to accurately and fairly describe this initiative.

1. The titles states twice that the elimination of the NOL deduction will "offset" the costs of creating the Program. This is false. The word "offset" suggests an equal and opposite impact. In fact, the Initial Fiscal Impact Statement for the measure indicates that the State will gain over \$250 million more from the elimination of the NOL Deduction than it will lose from the new income tax credit over the first three-and-a-half years after #169 becomes effective. Over the next six years, the State will lose over \$600 million as the result of the measure. The use of the term "offset" to describe the effect of the NOL Deduction will mislead voters.

2. The titles note that the elimination of the NOL Deduction will be “temporary”. While strictly true, the use of this term is misleading. The Program would operate until it sunsets on January 1, 2036. The elimination of the NOL Deduction would sunset on the same date. Referring to the NOL Deduction as “temporary” without including the fact that the Program is just as temporary is misleading. It suggests that a temporary tax increase will pay for a perpetual Program. Moreover, it is misleading to call the elimination of a tax deduction is “temporary” when the time period is more than 15 years.
3. The list of some of the learning programs to be funded is misleading, given that it is non-exclusive and designed to lure voters to support the measure based on this partial list of funding objectives. The list of programs is also misleading and inaccurate because the listed learning opportunities would not be available if the same opportunities are offered as part of an in-school educational program at a given school. *See* Proposed Section 22-86.1-102(7).
4. The terminology of “individual learning account” is inherently misleading, as it suggests a fund that is controlled by the individual, as in “individual retirement account.” *See* Proposed Section 22-86.1-103(2)(m)(V) (“No eligible contribution may be earmarked... for the benefit of... any individual or class of recipients”) at p. 5 of Initiative. The Board is not permitted to use misleading language in the titles, even if it is found in the initiative text, if that language will “impede voter understanding.” *Id.*
5. The use of the phrase “and by such amounts that are raised thereafter” in the title is misleading. The phrase suggests that the tax increase in the measure is perpetual when it will actually end after 2035. The language should be changed to “and by such amounts that are raised through 2035.”

B. The titles omit central features of the measure.

1. The titles do not set forth the initiative’s specific tax credit amounts of \$50 million per year up to \$300. *See* Proposed Section 39-22-121.5(2).
2. The titles do not state that the tax credit may be claimed by “any individual, firm, corporation, partnership, limited liability company, joint venture, estate, trust, or group or combination acting as a unit.” *See* Proposed Section 39-22-121.5(1) and 22-86.1-102(4).
3. The titles do not state that as much as 10% of the funds received by the administering non-profit can be used annually on its administrative costs – a figure ranging between \$5 million (when tax credit is capped at \$50 million) and \$30 million (when program has grown to its full amount). *See* Proposed Section 22-86.1-103(2)(m)(VII) at p. 5 of Initiative.

4. The titles do not state the appointing authorities (the governor and either the Speaker or the Minority Leader of the House of Representatives) of what is otherwise portrayed to be an “independent” agency. *See* Proposed Section 22-86.1-104(1)(a) at p. 6 of Initiative.
5. The titles do not state that parents do not control the so-called “parent-directed” individual accounts and should state that the administering nonprofit has sole control of how and when the funds are distributed to approved providers. *See* Proposed Section 22-86.1-103(2)(m)(V) at p. 5 of Initiative (“No eligible contribution may be earmarked... for the benefit of... any individual or class of recipients”); Proposed Section 22-86.1-103(2)(g) at p. 3 of Initiative (non-profit “shall have control over when and how financial aid is distributed”).
6. The titles do not state that parents cannot direct money to the so-called “parent-directed” accounts of their own choice, given that parents are expressly restricted to contributing to the administering nonprofit, which will have sole control of the funds and funding decisions that do not benefit specific children. *See* Proposed Section 22-86.1-103(2)(m)(V) (“No eligible contribution may be earmarked... for the benefit of... any individual or class of recipients”) at p. 5 of Initiative.
7. The titles do not state that money in a so-called “parent-directed” account is based on a “sliding scale,” which is contingent on family income and financial means of the eligible student. *See* Proposed Section 22-86.1-103(2)(g) at p. 3 of Initiative (financial aid is conditioned on “a sliding scale” which is “inversely related to the family income and financial means of an eligible student”).
8. The titles are silent on the fact that unused funds must revert – without condition or limitation on their use – to the administering non-profit. *See* Proposed Section 22-86.1-103(2)(j) at pp. 3-4 of Initiative (“Any funds in the individual learning account when the student no longer qualifies as an eligible student shall revert back to the administering non-profit”).
9. The titles do not state that certain eligible contributions, which must be sent by the administering non-profit to the agency within the Department of Education, are not specifically de-Bruced and therefore *are* subject to the State’s spending limits found in TABOR and other applicable laws. *See* Proposed Section 22-86.1-103(2)(m)(II) at p. 4 of Initiative (“Upon termination of any agreement with the agency, the administering non-profit shall remit all eligible contributions in its possession or control...”).

A ballot title is invalid where it is “so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶34 (Colo. 2016). This title suffers from that infirmity.

III. The titles violate TABOR.

The titles violate the Taxpayer's Bill of Rights in two ways. First, TABOR requires specific language to be included in the title of any measure that would raise taxes. Colo. Const. art. X, sec. 20(3)(c). The insertion of the words "on corporations" into that required language in the titles violates the requirement. Those words must be eliminated.

Second, the elimination of the NOL Deduction is phased in. Taxpayers would be able to carry forward losses from earlier years but would not be able to carry forward losses incurred after the effective date of the measure. As a result, the measure will generate more revenue each year as taxpayers use up deductible losses from years before the measure's effective date. Also, the elimination is temporary. Under these circumstances, TABOR requires the amount of the tax increase from the final year (2035) to be included in the title. Colo. Const. art. X, sec. 20(3)(c). The use of the first full fiscal year increase violates TABOR.

WHEREFORE, the titles set January 15, 2020 should be reversed, due to the single subject violations addressed herein and corrected to address a lack of needed information and material misrepresentations about #169.

RESPECTFULLY SUBMITTED this 22nd day of January, 2020.

RECHT KORNFELD, P.C.

s/ Thomas M. Rogers III
Thomas M. Rogers III
Mark G. Grueskin
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Email: trey@rklawpc.com
mark@rklawpc.com

Objector's Address:

355 South 44th St.
Boulder, CO 80305

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2019-2020 #169** was sent this day, January 22, 2020, via U.S. Mail postage pre-paid to the proponents at:

Amber Drevon
20756 E. Eastman Ave.
Aurora, CO 80013

Charles Dukes
11745 Kitteridge St.
Commerce City, CO 80022

s/ Erin Holweger

Erin Holweger