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Colorado Secretary of State

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Kelly Brough, Objector,

vs.

Natalie Menten and Chip Creager, Proponents.

**MOTION FOR REHEARING ON INITIATIVE 2019-2020 #245
("Petitions")**

Kelly Brough ("Objector"), a registered elector of the State of Colorado, through her undersigned counsel, submits this Motion For Rehearing on Initiative 2019-2020 #245 ("#245"), pursuant to C.R.S. § 1-40-107, and states:

The Board set the following ballot title and submission clause for Initiative 2019-2020 #245 on February 19, 2020:

> *Shall there be an amendment to the Colorado constitution concerning petitions, and, in connection therewith, allowing petitioning of all Colorado governments; changing petition requirements and procedures; requiring brief, plain English petition titles; limiting the amount of state legislation that is petition-exempt; allowing laws enacted by petition to be changed only by another petition; exempting petitions from municipal home-rule provisions; and repealing all conflicting laws?*

A. Initiative #245 contains multiple subjects, contrary to Colo. Const. art. V, sec. 1(5.5).

Initiative #245 violates the single subject requirement for initiatives. *In re Title for Initiaitve 2001-2002 #43*, 46 P.3d 438, 448 (Colo. 2002), *Colo. Const. art. V*, sec. 1(5.5). It would repeal, in whole or in part, provisions of four different articles of the Colorado constitution and one title of Colorado statutes—24 different sections of law in all—and would:

1) Modify numerous procedural aspects of the initiative petition process (including filing procedures, deadlines, administration, signature requirements (number), signature requirements (form); signature review, protests and appeals, voter information, enforcement and election timing);
2) Modify numerous procedural aspects of the referendum process (including but not limited to the procedural changes to the initiative petition process listed above);
3) Repeal and replace constitutional and statutory provisions that give registered electors of local governments initiatve and referenda powers;

4) Repeal the single subject requirement applicable to state wide initiatives (a substantive change);
5) Limit the free speech rights of initiative and referenda under the United States and Colorado constitutions by eliminating their opportunity to have their views included in election notices;
6) Limit the power of the general assembly to add safety clauses to legislation;
7) Limit the power of the general assembly by requiring voter approval for statutory changes on the same "topic" as a failed referendum.
8) Empower the supreme court to "reset titles" and "remove subjects" from ballot initiatives.

B. Even if the Title Board finds that it has jurisdiction to set titles for #245, the titles set are legally flawed because they fail to inform voters of certain central elements of the measure or would mislead voters.

The titles would fail to inform voters of the following central elements of the measure:

1) The measure would eliminate the right of rehearing before the title board. *See* #245, sec. 1(1)(requiring protests to ballot titles to be filed within two days after title is set and in the supreme court *only* (emphasis in original)); *see also* #245, sec. 5 (repealing all conflicting laws). The titles' "changing petition requirements and procedures" and "repealing all conflicting laws" language provides inadequate notice for a change of this magnitude.
2) The measure would give the supreme court the authority to "reset titles" and "remove subjects" from ballot measures. *See* #245, sec. 1(1). Under current law, the supreme court only has the power to affirm or remand a defective title. C.R.S. § 1-40-107(2). The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
3) The measure would reduce the number of signatures necessary to place a ballot measure on the ballot by more than 10% (from the current 124,632 requirement to only 110,000). *See* https://www.sos.state.co.us/pubs/elections/Initiatives/signatureRequirements.html and #245, sec. 1(2). The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
4) The measure would repeal the statutory provisions that allow the secretary of state to use random sampling in the examination of petition names and signatures. *See* #245, sec. 1(2). The titles' "changing petition requirements and procedures" and "repealing all conflicting laws" language provides inadequate notice for a change of this magnitude.
5) The measure would essentially eliminate the requirement that petition circulators properly complete an affidavit verifying compliance with applicable law by prohibiting the invalidation of petition names and signatures as a consequence for completing the affidavit incorrectly. *See* #245, sec. 1(2). The titles' "changing petition requirements and procedures" and "repealing all conflicting laws" language provides inadequate notice for a change of this magnitude.

6) The measure would expand the time for petition circulation from six months to one year. *See* C.R.S. § 1-40-108 and #245, sec. 1(3). The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
7) The measure would eliminate name and signature protests to district court and instead requires all protests to begin in the supreme court. *See* C.R.S. § 1-40-118(1) and #245, sec. 1(3). The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
8) The measure would allow any measure, not just TABOR measures, to be placed on odd-year ballots. *See Colo. Const. art. V*, sec. 1(2) and #245, sec. 1(4). The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
9) The measure would eliminate the requirement that the arguments of both supporters and opponents of a measure be included in a guide distributed to voters. *See* #245, sec. 1(4). The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
10) The measure would require supporter and opponent websites to be listed on ballots. *See* #245, sec. 1(4). Importantly, opponents are required to file a request to have their website included on the ballot even though the deadline for filing may before the deadline for signature submission and the deadline for the secretary of state's sufficiency determination. This provision would require opponents to form an issue committee, raise money, create a website and file a request to have that website included on the ballot before they know if petitions will be submitted by proponents or approved by the secretary of state.
11) The measure would limit the power of the General Assembly by requiring voter approval for statutory changes on the same "topic" as a failed referendum. *See* #245, sec. 2.
12) The measure would create a new $3,000 fine for anyone who interferes with a petition circulated. *See* #245, sec. 4. The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude.
13) The measure would repeal Amendment 71—known as the "Raise the Bar" amendment--approved by voters in 2016. *See* #245, sec. 5. The titles' "changing petition requirements and procedures" language provides inadequate notice for a change of this magnitude, especially where the measure would repeal voter-approved constitutional and statutory amendments made less than four years ago.

The titles would mislead voters in the following ways:

1) The measure would limit ballot titles to 60 words. See #245, sec. 1(1). The titles' "requiring brief...titles" language does not suggest a hard limit, when in fact the measure includes a hard limit. The requirement for brief titles already exists in state statute. C.R.S. 1-40-106(3)(b) ("Ballot titles shall be brief....").
2) The measure would limit the opportunity for the general assembly to make its enactments effective upon signature by the governor, even if it finds immediate enactment is necessary for the preservation of the public peace, health, and safety. *See See* #245, sec. 2 and *In re Interrogatories of the Governor*, 181 P. 197 (Colo. 1919)

(holding that in order to allow the opportunity for filing a "rescission" referendum petition for ninety days after the legislative session, any bill without a safety clause could not take effect for ninety days). The titles' "limiting the amount of state legislation that is petition-exempt" language will be meaningless to the vast majority of voters. The fact that the language is taken almost verbatim from the measure does not necessarily satisfy the requirement that the titles fairly reflect the contents of the measure. *See In re Proposed Initiative on Obscenity*, 877 P.2d 848, 850 (Colo. 1994). This reference is particularly misleading given the use of "petition" rather than the actual legal right being used, the right of initiative.

3) The measure would prohibit the general assembly from changing statutory language approved by voters. *See* #245, sec. 4. The titles' "allowing laws enacted by petition to be changed only by another petition" language is faulty because, as the measure notes, "[n]o petition changes any law." Moreover, the measure's definition of "petitions" includes "referenda". An initiative's hidden and misleading meaning use of "petition" in an initiative will inevitably produce one result for a ballot title: "voters would be surprised to learn" the actual breadth of the ballot measure. *In re Title for Initiaitve 2001-2002 #43. supra*, 46 P.3d at 448. Accordingly, the language of the titles should be changed to avoid such voter surprise by restating it as follows: "allowing laws enacted by *initiative* to be changed only by another *initiative*."

C. The Title Board should not have set a title for #245 because certain provisions are so vauge, unclear and incomprehensible that the measure's meaning cannot be ascertained.

Several provisions of #245 are impossible to comprehend or understand. "[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999).

In particular, the measure would repeal art. V, sec. 1(5.5) of the Colorado constitution, which prohibits measures containing more than one subject. *See* #245, sec. 5. Then the measure makes reference to "protests...to enforce the state single subject rule, which remains in effect." *Id.* at sec. 1(1). It is impossible to resolve this contradiction. The measue both repeals the single subject rule and notes that it stays in effect. If the single subject rule in fact "remains in effect" then what requirement is actually going to result from an adoption of this proposal? Certainly not the one set forth in Art. V, Sec. 1(5.5)—that one would be expressly repealed.

What is particularly perplexing about this contradiction is that is has been repeatedly pointed out to proponents in the review and comment process and in their appearances before this board, yet they have refused to be explicit about the law that is being proposed to voters. Are proponents trying to have their cake and eat it too? Are they trying to convince the board to approve a title that does not reference the repeal of the single subject rule, only to argue during a campaign and/or after passage that the single subject

rule was expressly repealed by the measure? It is difficult to know, but their refusal to address a problem that has been repeatedly addressed raises questions.

Certainly, our courts will be called upon to resolve this blatant contradiction if #245 passes. If the courts determine that the measure does, in fact, repeal the single subject rule, then under the current titles, voters will have voted on the measure without notice of this critical change in law. Moreover, if the measure repeals the single subject requirement, then it certainly violates the current single subject rule by mingling procedural and substantive provisions. *See In re Title, Ballot Title and Submission Clause for 2003-2004 #21, #22, #32 and #33*, 76 P.3d 460, 462 (finding a second subject where a measure combines procedural and substantive changes to existing law). Under the cicrumstances, the single subject of #245, if there is one, cannot be ascertained and the measure cannot be forwarded to the voters.

Another inscrutable aspect of the measure is that it uses new terminology without definition. For instance, election officials are required to "handle" petitions. *See* #245, sec. 1(1). Deadlines are based on when "initiatives begin". *Id.* Something called "draft reviews" are required. *Id.* The supreme court is authorized to "reset ballot titles" and "remove subjects" from ballot measures. *Id.* There is a reference to petitions based on "adapting 1992 forms". *Id.* The term "entries" is used in a possible rererence to names and signatures on petitions. *Id.* at sec. 1(2). Proponents and objectors may be refered to as "filers" and "foes". *Id.* at sec. 1(3) and (4). A statement of sufficiency may be refered to as an "invalidity report". *Id.* at sec. 1(3). This list could include many more items. The cumulative effect of the use of these terms not currently used in law and not defined is an incomprehensible measure. The board has certainly done its best to set a title for the measure, but it is far from clear that it has understood proponents' intent and reflected it in the title.

Finally, the measure includes certain italicized sentences without apparent meaing. For instance, Section 1(4) includes this provision: "*No petition changes any law; it only gives citizens the Right to Vote.*" Another provision reads, "*Government hostility to petitions must cease.*" *See* #245, sec. 4. It is unclear what these provisions mean or what legal effect they may have. Under these circusmstances, it is impossible to know if they should be referenced in the title or not. The board has ignored these provisions in the title. Will they be the basis of a future legal argument alleging some heretofore unknown import? If so, will their exclusion from the title lul voters into voting for a measure without understanding their meaning? The measure is simply too incomprehensible to go forward to the voters and the board should decline to set a title for it.

Accordingly, the Objector respectfully requests that a rehearing be set pursuant to C.R.S. § 1-40-107.

Respectfully submitted this 26th day of February, 2020.

s/ Thomas M. Rogers III
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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the Motion For Rehearing for Initiative 2019-2020 #245, was sent this 26th day of February, 2020 by U.S. Mail, postage prepaid, to proponents at:

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s/ Erin Holweger