BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Kenneth Nova, Objector,

vs.

Chad Cookinham and Camille Howells, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2019-2020 #250

Kenneth Nova, registered elector of the State of Colorado, through his undersigned counsel, objects to the Title Board's (the "Board") title and ballot title and submission clause set for Initiative 2019-2020 #250, and states:

The Board set a title for Initiative 2019-2020 #250 on February 19, 2020. The Board designated and fixed the following ballot title and submission clause:

> *Shall there be a change to the Colorado Revised Statutes to create 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 a state agency independent of the department of education to oversee the program to ensure financial accountability and transparency and to select a nonprofit to administer the program; repealing the program in 2035; allowing a state income tax credit of 100% of a taxpayer's contribution to fund the program; and temporarily limiting the state income tax net operating loss deduction for corporations by an amount set annually by the department of revenue to offset, as nearly as practicable, the tax revenue loss resulting from the allowed income tax credit?*

I. <u>The Board lacks jurisdiction over Initiative #250, as it violates the Constitution's single subject requirement.</u>

At the initial hearing on #250 the Proponents identified the creation of an out-of-school learning opportunities program (the "Program") as the subject of the measure. The measure would fund the Program through a limit on the net operating loss tax deduction the ("NOL Deduction"). *See* #250, Sec. 3. In an effort to avoid a title that includes the mandatory "shall taxes be increased" language of section 3(c) of TABOR ("section 3(c)"), Proponents have added an extra feature to the measure. Instead of simply funding the Program with revenue from

limiting the NOL Deduction, the measure would create a new tax credit to fund the Program and would then use revenue from limiting the NOL Deduction to offset the cost of that tax credit. *Id.* As set forth in detail below, the effort to avoid the mandatory language of section 3(c) fails. In addition, Proponent's fiscal gymnastics create a second subject in the measure and deprive the Board of jurisdiction to set title.

This measure is the fifth in this cycle (following #168-#171) that would fund an out-of-school learning opportunities program by limiting or eliminating the NOL Deduction. Two of the earlier four would have funded the Program directly with proceeds from the NOL Deduction. The Board set titles for those measures. The remaining two, like #250, would have added the extraneous tax credit. Correctly, the Board refused to set a title for those two measures. The current measure should meet the same fate.

The use of the tax credit, instead of funding the Program directly through limiting the NOL Deduction, is a second subject. The tax credit is not necessarily and properly connected to the single subject of the measure: creating and funding the Program. The measure's unnecessary creation of the tax credit 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 and would mislead voters.

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

1. The titles note that the elimination of the NOL Deduction will be "temporary". Given that the period of time at issue here is a decade and a half,, the use of this term is misleading. The NOL Deduction would sunset on January 1, 2036. *See* #250, Sec. 3. Referring to the NOL Deduction as "temporary" without including at least the year in which the limit would sunset is misleading. It is misleading to call the elimination of a tax deduction "temporary" when the time period is as extended as it is here.

2. 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 Sec. 22-86.1-102(7). This partial list should be omitted from the ballot title.

3. The language in the title stating that the creation of a new state agency to oversee the program will "ensure financial accountability and transparency" is an impermissible catch phrase or slogan. Nothing in the measure can actually "ensure" delivery of this politically calculated goal.

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 Sec. 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 Sec. 22-86.1-102(5).

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 Sec. 22-86.1-103(2)(m)(VII) at p. 5 of Initiative.

4. The titles do not specify the political 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 Sec. 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 Sec. 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 Sec. 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 Sec. 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 Sec. 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 Sec. 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 Sec. 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…").

III. The titles violate TABOR.

The titles violate TABOR. The measure includes a tax increase, so the titles must include the mandatory language of section 3(c). At the initial hearing, the Board determined that the mandatory language of section 3(c) is not required for this measure. That was error.

The Board accepted Proponents' argument that the measure does not fall within any category triggering the voter approval requirement of Section 4(a) of TABOR ("section 4(a)"), primarily because the revenue generated by the limit on the NOL Deduction and the cost of the measure's new tax credits are structured to balance with one another. Thus, Proponents argued, there is no net revenue gain, and no section 4(a) trigger is tripped. This argument is inconsistent with TABOR and applicable Supreme Court precedent.

Section 3(c) requires the use of mandatory language in "[b]allot titles for tax or bonded debt increases." The meaning of "tax increase" in that context has been clear since 2006. In *Bruce v. City of Colorado Springs*, 129 P. 3d 988, 994 (Colo. 2006), the Colorado Supreme Court held that "section (4)(a) does not guide our understanding of the term "tax increase" as it appears in section 3(c)." Instead, based on the plain meaning of the term, the Court held that "a tax 'increase' indicates that the **tax burden borne by an individual taxpayer will be greater than its present amount**." *Id.* at 995 (emphasis added). The Court went on to note that "the principle underlying the election provisions" of section 3 is "that the electorate should be provided with sufficient information to make intelligent decision on ballot issues." *Id.*

Proponents' reliance on section 4(a) is therefore misplaced. Instead, the Board must determine whether the measure includes a "tax increase" as that term is used in section 3(c). It does. The measure's limitation of the NOL deduction will cause the tax burden borne by certain taxpayers to be greater than its present amount. The offsetting effect of the measure's new tax credit is irrelevant to the section 3(c) analysis. TABOR requires notice to voters that the measure includes a tax increase and the amount of that increase. The title must include the mandatory language of section 3(c).

WHEREFORE, the titles set February 19, 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 #250.

RESPECTFULLY SUBMITTED this 26th day of February, 2020.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2019-2020 #250** was sent this day, February 26, 2020, via U.S. Mail postage pre-paid to the proponents at:

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s/ Erin Holweger
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