COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2019-2020 #271

MOTION FOR REHEARING

On behalf of Kelly Brough, registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing for Initiative 2019-2020 #271 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

I. INITIATIVE #4 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

While the measure, in the abstract, broadly concerns changing Colorado's flat income tax to a graduated one, it contains multiple separate subjects, in violation of section 1 (5.5) of article V of the Colorado Constitution and section 1-40-106.5, C.R.S. Multiple separate subjects allow the proponents to strategically combine separate proposals into a single measure to alleviate their potential concern that one of the subjects might fail if presented to voters alone. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012).

In a presidential election year where tax policy, education funding, and spending on other essential government services (such as transportation, healthcare, and housing) have been, and will continue to be, hot button topics, Initiative #271 impermissibly aims to appeal to separate and distinct voting blocs for passage. Those voting blocs including voters who are distinctly in favor of (i) decreasing taxes for lower-income Coloradoans; (ii) increasing taxes on wealthier Coloradoans; (iii) increasing state oversight of tax policy; (iv) increasing education funding for public schools; and (v) addressing the effects associated with Colorado's growing population (*e.g.*, traffic congestion and housing costs).

The following separate components of the measure are distinct and without a necessary or proper connection. *See, e.g., In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 878 (Colo. 2007).

1. The measure creates authority under the Colorado Constitution for a graduated income tax by ***repealing*** long-established constitutional language that all taxable net income in Colorado is taxed at one rate.

2. The measure changes Colorado statute to ***increase*** the individual state income tax rates for three different brackets:

    a. For federal taxable income over $250,000.00 but no greater than 500,000.00, $11,450.00 plus 7 percent of the amount over $250.000.00;
    b. For federal taxable income over $500,000.00 but not greater than 1,000,000.00, $28,950.00 plus 7.75 percent of the amount over $500,000.00; and
    c. For federal taxable income over $1,000,000.00, $67,700.00 plus 8.90 percent of the amount over $1,000,000.00.

3. The measure also ***decreases*** the individual state income tax rate for one tax bracket (from 4.63 percent to 4.58 percent for federal taxable income less than $250,000.00), which will allow the measure to garner support from separate groups favoring and disfavoring increases in taxes.

4. The measure annually adjusts the income brackets by the percentage change in Colorado personal income.

5. The measure creates a 25-member Fair Tax Review Commission to review and file reports on the effectiveness of the graduated tax income rates and to recommend changes.

6. The measure once again attempts to garner support from separate groups by establishing that revenue collected from the increased individual income tax and the corporate alternative minimum tax is exempt from the state TABOR limit (De-Bruced) as a voter-approved revenue change, and is spent as follows:

    a. (At least) 50 percent to supplement current funding for preschool through 12th grade education;
    b. The remaining revenue to address the impacts of a growing population and a changing economy, and
    c. No more than 10 percent may be expended for administrative costs.

7. The measure creates a Citizen's Oversight Committee to oversee the distribution of the revenue garnered through the graduated income tax and the alternative minimum corporate "income tax."

Therefore, the Title Board lacks jurisdiction to set title for Initiative #271 because it succumbs to one of the dangers of omnibus measures and impermissibly joins at

least seven "incongruous subjects in the same measure," instead of having the passage of "each proposal depend on its own merits." *In Re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 646 (Colo. 2010).

Moreover, the measure is not saved by the proponents' characterization of the provisions as all falling under the umbrella topic or theme of "income tax policy." The Colorado Supreme Court has held that that "water," "revenue changes," and "local regulation of oil and gas development" are three examples of "overarching themes" that did not qualify as single subjects when the proposed initiatives associated with those themes contained disconnected or incongruous provisions.

Just as the theme of "water" did not satisfy the single subject rule when the measure sought to establish a so-called public trust doctrine and to impact the procedures of water conservation district elections, Initiative #271 does not satisfy the single subject rule by changing Colorado's flat income tax to a graduated one, establishing two oversight committees, and dictating that revenue must be spent on education and growth challenges. *See In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076,1080 (Colo. 1995); *see also In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (holding that the umbrella subject of "revenue changes" did not alter the fact that the measure contained two unrelated subjects – a tax credit and changes to the procedural requirements for ballot titles); *In re Title, Ballot Title and Submission Clause for 2013–2014 #90 and #93*, 2014 CO 63, ¶ 53 (holding that "the overarching theme of 'local regulation of oil and gas development' does not qualify as a single subject because the Proposed Initiatives contain disconnected and incongruous provisions that vest local governments with authority to regulate oil and gas development on the one hand and limit takings law on the other").

The theme of "income tax policy" is at least as equally broad as these other improper umbrella topics, rendering the Title Board without jurisdiction to set title for Initiative #271.

II. THE TITLE BOARD LACKS JURISDICTION TO SET A TITLE BECAUSE THE PROPOSED MEASURE IS SO VAGUE, AMBIGUOUS, AND CONFUSING THAT IT CANNOT BE UNDERSTOOD.

Initiative #271 is vague, ambiguous, and confusing in at least two respects. Section 5 of the measure contains conflicting language on how the revenue obtained from the proposed taxes would be spent. At first, the measure states that ***"[a]t least*** fifty per cent of such revenue shall be appropriated and expended for pre-primary-12 education . . . ." However, the measure then specifies that "***[t]he*** fifty percent shall be" appropriated for education. It is therefore unclear whether the measure would allocate exactly 50 percent or at least 50 percent of the revenue generated from the new graduated income tax rates to education. This confusion is

compounded by other language in Section 5, which states that "[t]he remainder of such revenue shall be appropriated and expended to address the impacts of a growing population and a changing economy." Thus, voters have no way of knowing whether the remaining revenue to address growth challenges is 50 percent or some unknown percentage below that.

If the proponents intend that exactly 50 percent of the revenue appropriated be spent on education, up to 50 percent of the remaining revenue could be allocated to address the impacts of population or economic changes. Alternatively, if the proponents envision spending at least 50 percent of the increased revenue on education, it is possible that 90 percent of the increased revenue is expended for that purpose. In that instance, little to none of the measure's increased revenue could be allocated to "address the impacts of a growing population and a changing economy."

Third, if the proponents intend that at least 50 percent of the revenue will be spent on education, the measure lacks any detail as to who decides what percentage (50 percent or greater) will be appropriated for that purpose. A voter with detailed knowledge of the state budgetary and fiscal process could assume the state legislature is the decision maker, but a voter without such knowledge could conceivably believe the decision maker to be the newly created Citizen's Oversight Committee, the newly created Fair Tax Review Commission, or the governor, or even believe the money would go directly to their local school board. Because Initiative #271 does not expressly state who is responsible for appropriating and expending the revenue "through current funding distributions," the options are left to the voters' imaginations.

In short, voters need to know whether they are voting for 50 percent or some unknown higher percentage of the increased revenue going to education, how the percentage is decided, and who makes that decision. For the foregoing reasons, Initiative #271 needs to be returned to the proponents to correct these errors and for them to clarify their intentions.

III. THE TITLE DOES NOT ADEQUATELY DESCRIBE THE MEASURE.

The Title does not accurately describe the tax brackets for the proposed graduated income tax. For example, although the second tax bracket consists of federal taxable income over $250,000.00 but no greater than 500,000.00, the title incorrectly states that this bracket is "from $250,001 to $500,000." There is a difference between over $250,000.00, which includes $250,000.01, $250,000.02, and so on, and "from $250,001." The same is true for the third tax bracket. Accordingly, the Title should be rewritten to correct this error.

CONCLUSION

Accordingly, the Objector respectfully requests that this Motion for Rehearing be granted and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 26th day of February, 2020.

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