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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Anna Jo Haynes, Objector,

vs.

Monica Vondruska and Jon Caldara, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2019-2020 #293

Anna Jo Haynes (“Objector”), a registered elector of the City & County of Denver and the State of Colorado, through undersigned counsel, submits this Motion For Rehearing on Initiative 2019-2020 #293 (“#293”), pursuant to C.R.S. § 1-40-107, and states:

I. The ballot title for this measure was set by the Title Board

On April 1, 2020, the Title Board set titles for Initiative 2019-2020 #293. The ballot title and submission clause as designated and fixed by the Board reads:

Shall there be an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning a new preschool program that is funded by reallocating revenue generated by existing state taxes on tobacco and nicotine products, and, in connection therewith, requiring the state to create and administer the new preschool program, which must supplement existing preschool programs and funding, by reallocating from certain health-related programs and other state purposes portions of the following existing revenue sources: 1) taxes on tobacco and nicotine products; and 2) money the state receives from tobacco litigation settlements?

II. The Title Board erred in setting this ballot title.

A. Initiative #293 violates the single subject requirement in the Colorado Constitution.

1. The measure withdraws state cigarette tax revenue if a local jurisdiction enacts a ban of “tobacco and nicotine products in any form.” #293 thus creates a significant fiscal disincentive that applies solely to local jurisdictions that act to protect the health of their residents; if they ban the sale any form of tobacco and nicotine products, they must forfeit cigarette tax revenues to which they would otherwise be entitled. These financial penalties for banning tobacco and nicotine products represent #293’s second subject.

Existing statute blocks certain local governments from getting part of the revenue that is set aside from cigarette taxes to prevent double taxation of the same product. C.R.S. §39-22-623(1)(a)(II)(A). This statute thus prevents the affected local governments from taxing cigarettes themselves and then also taking a share of the state cigarette tax revenue.

#293 has no such internal justification. In fact, this revenue restriction deals with moneys raised solely from cigarette taxes, and the ban triggers the defunding of local shares if it applies to sale of one or more tobacco and nicotine products, defined by #293 to “include[]” but not be limited to “cigarettes.” The revenue restriction and the ban thus are not directly related or necessary to one another. *See* Proposed Section 39-26-623(1)(c) (“tobacco and nicotine products’ includes cigarettes”).

2. The measure amends a previously adopted constitutional amendment to change its purpose. Because it also changes multiple provisions of law that are unrelated to that constitutional provision, the Supreme Court has held that such a proposal must be presented to voters in two separate initiatives since that revision of previous voters intent is its own subject. *See In Matter of Title, Ballot Title & Submission Clause for Initiative #2015-2016 #132*, 2016 CO 55, ¶¶21-25, 374 P.3d 460 (single subject requirement violated where voter-approved commission would have its “role and mission” altered by changes proposed by proposed initiative).

B. The titles set for Initiative #293 are incomplete in describing the measure’s central features and are otherwise misleading to voters.

1. If it is not a second subject, the prohibition on sharing state cigarette taxes with localities that ban the sale of “tobacco and nicotine products in any form” is a central element that must be disclosed. *See* Proposed §39-22-623(1)(a)(II)(A). A “ban” occurs whenever there is an attempt “to prohibit” or “to forbid” access to something. Webster’s New Twentieth Century Dictionary 144-45 (1976) (definition of “ban”); Black’s Law Dictionary 154 (8th ed. 2004) (defining “ban” as “[t]o prohibit, esp[ecially] by legal means”), both sources cited by *Am. Civil Liberties Union of Fla, Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1218-19 (11th Cir. 2009).

Looking at the Denver Municipal Code as just one example, such prohibitions or “bans” are commonplace. For instance, if the measure prohibits the form of ban that applies to place of sale, Denver and other municipalities ban the sale of cigarettes through vending machines. *See* D.M.C. §24-403 (“It shall be unlawful for any person to sell or offer for sale any cigarettes or other tobacco products by use of a vending machine or other coin-operated machine”). If the measure prohibits a ban on the form of the tobacco sold, Denver and other jurisdictions ban tobacco products sales “in any form” other than the manufacturer’s packaging. *See* D.M.C. §24-405(a) (“It shall be unlawful for any person to sell tobacco products in any form or condition other than in the packaging provided by the manufacturer”).

In either instance, cities that would consider these or other prohibitions on sale would be subject to this significant change in how cigarette taxes are distributed. Voters in those cities should be informed that, by voting “yes,” they would give up access to these state revenues.

2. Since certain named accessories do not qualify as “tobacco or nicotine products,” voters should be told the measure does not require loss of state cigarette tax funding where there are local bans of “accessories such as rolling papers, pipes, and vape pens” rather than vaping liquids that are nicotine products. *See* Proposed Section 39-26-623(1)(c).
3. The single subject statement and the later title statement about reallocating taxes both refer to such taxes as being imposed on “tobacco and nicotine products” (a seemingly limited phrase). That reference fails to state that the affected taxes actually include taxes imposed on cigarettes. *See* Proposed Section 39-26-623(1)(c) (“‘tobacco and nicotine products’ includes cigarettes”).

As a matter of current law, cigarette taxes are not tobacco product taxes. Compare C.R.S. §39-28-202(4) (defining “cigarette” for tax purposes) with C.R.S. §39-28.5-101(5) (defining “tobacco product” at length for tax purposes). In fact, the definition of “tobacco product” is express that such phrase “does not include cigarettes.” *Id.* Nor are cigarettes deemed, as a matter of law, to be within the broader category of “nicotine products.” Thus, voters would not know that the generic phrase used in the titles is intended to cover cigarette taxes. As a legally inconsistent and thus critical definition, the fact that taxes on these products include taxes on cigarettes must be disclosed to voters in the titles. *See In the Matter of the Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

4. The use of the term “reallocating” is misleading. The measure prohibits the use of the designated revenue for certain purposes and requires its use as to a different set of purposes. “Reallocating” the affected revenue misstates what the measure does.
5. This measure exempts vaping accessories from the definition of “tobacco and nicotine products.” *See* Proposed Section 39-26-623(1)(c) (“‘tobacco and nicotine products’... does not include accessories such as... vape pens”). Given that such vaping-related items are used to deliver nicotine to their consumers, this would be a matter that would not be perceived by voters based on the ballot title. Voters should be informed by the titles that this measure excludes accessories that are the very devices they have cause to believe are covered by a broad category like “tobacco and nicotine products.”
6. The titles fail to set forth the major funding cuts mandated by #293 and should, at a minimum, specify that tobacco settlement funds cannot be used by larger funding beneficiaries (those recipients that have received at least 5% of these tobacco settlement monies):

- (a) the nurse visitor program;
- (b) cancer research and capital construction at the university of Colorado health sciences center; and
- (c) programs to reduce youth crime and violence and child abuse and neglect (referred to in #293's repeal as "the Tony Grampas youth services program").

All of these programs are reliant upon significant shares of these settlement funds. Voters should know that these specific programs are being defunded to a substantial degree due to #293, rather than have intuit such information from the titles' obscure phrase "certain health-related programs."

If the Title Board is going to be consistent in its own title-setting practices, it will provide voters with such information about these funding uses. For example, for Initiative 2019-2020 #250, the Board set a title for a program that set up the so-called "learning opportunities" program and incorporated into the title wording to describe the uses of such funds. The titles stated these monies would "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." This is a non-exclusive list from the initiative itself, but that partial list was deemed by the Board to be essential to voter understanding. The board also used, but did not simply rely on, the catch-all phrase, "out-of-school learning opportunities."

Likewise, when the Title Board set the ballot title for Amendment 35 in 2004 for the constitutional tobacco tax, it listed specific programs to be funded: "expand eligibility for and increase enrollment in the children's basic health plan,... comprehensive primary medical care through certain Colorado qualified providers, tobacco education programs, and prevention, early detection, and treatment of cancer and cardiovascular and pulmonary diseases." If this list was appropriate for approving funds from tobacco taxes, a list of programs that stand to lose the most significant percentage shares of tobacco-related funding (namely, (a)-(c) above) is also appropriate for the ballot title for Initiative #293.

7. The titles refer to "tobacco litigation settlements" (plural). The Review and Comment memo on #293 points out there is a single Master Settlement Agreement. (Question 19.a, page 7; www.tinyurl.com/293RevCom) The use of the plural here is misleading.
8. Per the #293 Review and Comment memo, the reference to the tobacco litigation settlement should be qualified to reflect that expenditure of these funds is limited to "public health purposes only" rather than preschool access. (Question 19.f, page 8).

WHEREFORE, the Title Board should reverse its decisions of April 1, 2020 as to Initiative #293.

Respectfully submitted this 8th day of April, 2020.

s/ Mark G. Grueskin
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CERTIFICATE OF SERVICE

I, Mark Grueskin, hereby affirm that a true and accurate copy of the Motion For Rehearing for Initiative 2019-2020 #293, was sent this 8th day of April, 2020 by email to counsel of record for the designated representatives at:

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