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COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2019-2020 #295

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2019-2020 #295

On behalf of William Hunter Railey, registered elector of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2019-2020 #295 ("Initiative #295") and as grounds therefore state as follows:

I. THE TITLE SET BY TITLE BOARD AT MARCH 4, 2020 HEARING

On April 1, 2020, the Title Board set the following ballot title and submission clause for Initiative #295:

> Shall there be a change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer's Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than $100 million within the first five fiscal years of the creation or qualification of the new enterprise?

II. GROUNDS FOR REHEARING

A. The Initiative Impermissibly Contains Several Separate and Distinct Subjects in Violation Single Subject and Clear Title Requirements.

Pursuant to Colo. Const. art. V, §1(5.5),

> no measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title . . . . If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

See also 1-40-106.5, C.R.S. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects." *Aisenberg v. Campbell* (*In re Title, Ballot Title & Submission Clause 1990-2000 #104*), 987 P.2d 249, 253 (Colo. 2000).

1. Initiative #295 Violates the Single Subject Requirement by Reducing State Spending on State Programs.

Initiative #295 purports to create a voter approval requirement for the new creation or qualification of state enterprises collecting revenue from fees and surcharges over $100,000,000 in its first five fiscal years. A close review of the Initiative, however, reveals that not only does it establish a voter approval requirement for state enterprises, it also reduces state spending on state programs by requiring existing enterprises to cease being qualified to exist outside of Colo. Const. art. X §20 once they collect $100,000,000 in their first five fiscal years without voter approval. Once an enterprise reaches the revenue threshold, it must obtain voter approval to continue to be an enterprise but that can occur only at a statewide general election – which may be two years in the future. Because of the spending and revenue limitations contained in TABOR, however, the state cannot increase either its overall spending or revenue collection to maintain the current level of spending on state enterprises. As a result, the Initiative will require the state to dedicate a portion of the state's current revenues to replace lost enterprise revenue that must be refunded under TABOR, and as a result the state must lower the amount it spends on state programs.

First, the Initiative requires voter approval at a statewide general election for enterprises that collect $100,000,000 in their first five fiscal years. Second, the Initiative imposes reductions in state spending on state programs when an enterprise exceeds the threshold and may be awaiting or has been denied voter approval. These two subjects are distinct and have separate purposes. Requiring voter approval of certain enterprises is not "dependent upon and clearly related" to the state spending reductions. *See Outcelt v. Bruce*, 961 P.2d 456, 460-461 (Colo. 1998). Voters would be surprised to learn that by voting for voter approval of certain enterprises, which might include community colleges or paid family leave programs, they also had required the reduction, and possible eventual elimination, of these same or other state programs. *Id.* That type of hidden subject is not permitted under article V, section 1(5.5), of the Colorado Constitution.

"The single subject requirement is intended 'to prevent surprise and fraud from being practiced upon voters' caused by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016) (*quoting In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002)). The purpose is to "obviate the risk of 'uninformed voting caused by items concealed within a lengthy or complex proposal'" *Id.* While the Initiative is not long, a measure can be "complex" without necessarily being "lengthy" – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can harbor the most pernicious surprises "coiled up in [its] folds."

Here, Initiative #295 brings all these dangers.

2. Initiative #295 Violates the Single Subject Requirement Because the Title Board Cannot Comprehend the Initiatives Enough to State Their Single Subject in the Titles.

Initiative #295 violates the single-subject requirement because a clear title cannot be set setting forth a single subject of the measure. Initiative #295 is identical to Initiative 2019-2020-#273, with the addition of the words "from fees and surcharges" to describe the source of revenue for an enterprise. At the April 1st Title Board meeting when #295 was initially heard, the Proponents explained that the measure was the same as #273 but for that small change. Also, at the April 1st Title Board hearing, the Title Board recalled the discussion during the March 4th hearing on #273 and engaged in no further discussion. During the Title Board hearing on March 4, 2020, the Title Board expressed confusion about the meaning of the term "qualified" and the intent of the measure. Even the Proponents of the measure differed in their interpretation of the measure's meaning. In cases such as this one, where the Title Board has acknowledged that it does not understand exactly what the Initiative purports to do, and as a result it does not understand the measure well enough to state its single subject in the title, the Initiative cannot be forwarded to the voters and must, instead, be returned to the proponent. *See Title v. Bruce,* 974 P.2d 458, 469 (Colo. 1999).

Even if the title substantially tracks the language found in the Initiative itself, "the source of a title's language does not rule out the possibility that the title could cause voter confusion." *In re Proposed Initiative on "Obscenity*", 877 P.2d 848, 850 (Colo. 1994); *Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016); *see also In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999) ("Here, perhaps because the . . . proposed initiative [itself] is difficult to comprehend, the titles . . . are not clear.").

Although the right of initiative is to be liberally construed, "[i]t merits emphasis that the proponents of an initiative bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider." *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62,* 184 P.3d 52, 57 (Colo. 2008) (citation omitted). In cases like this, where the initiative is incomprehensible, and the Board has acknowledged confusion about what the measure means, then there is no clear title that states a single subject and the Initiative must be returned to the Proponents.

B. The Ballot Title and Submission Clause Is Misleading, and Does Not Correctly and Fairly Express Its True Intent and Meaning.

The title of the Initiative is misleading and does not correctly and fairly express the initiatives' true intent and meaning. Section 1-40-106(3)(b), C.R.S. provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause. . . .

The title of Initiative #295 misleads the voters because there is no obvious connection between the title and the initiative and to understand the initiative based on this title will require "ingenious reasoning, aided by superior rhetoric." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 25*, 974 P.2d 458, 462 (Colo. 1999) (quoting *In re Breene*, 14 Colo. 401, 406, 24 P. 3, 4 (1890)).

For example, the title contains no reference to one of the central features of measure - the requirement that ballot titles for enterprises begin with the specific language, "SHALL AN ENTERPRISE BE CREATED TO COLLECT REVENUE TOTALING (full dollar collection for first five fiscal years) IN ITS FIRST FIVE YEARS?" The absence of this requirement in the title may impair a voter's ability to determine whether to support or oppose the proposal.

Another central feature of the measure is that enterprises may "qualify" for the voter approval requirement after they have been in existence for up to five years. The measure does not define what "qualified" means and neither does the title. But voters will not understand from the title what it means to require voter approval of any "newly created or qualified state enterprise."

Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). Here, the title for Initiative #295 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. See generally 1-40-106(3)(b); *see also In re Proposed Initiative on "Obscenity,"* 877 P.2d at 850-51.

The title for Initiative #295 does not enable voters to make an informed choice because it does not correctly and fairly express its true intent and meaning.

III. CONCLUSION

Based on the foregoing, William Hunter Railey requests a rehearing of the Title Board for Initiative 2019-2020 #295, because the initiative contains multiple subjects, the title is unclear and misleading to voters, and it fails to fairly express the initiative's true meaning and intent. As a result, the Title Board lacks jurisdiction to set a title and should reject the measure in its entirety.

Respectfully submitted this 8th day of April 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of April, 2020, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2019-2020 #295** was filed and served via email to the following:

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