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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 #315

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 #315 (“#315”), 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 15, 2020, the Title Board set titles for Initiative 2019-2020 #315. The ballot title and submission clause as designated and fixed by the Board reads:

SHALL STATE TAXES BE INCREASED \$6,300,000 ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION AND A CHANGE TO THE COLORADO REVISED STATUTES CONCERNING A NEW PRESCHOOL PROGRAM THAT IS FUNDED WITH REVENUE GENERATED BY 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, AND PAYING FOR THE PROGRAM BY: 1) IMPOSING A NEW TAX ON TOBACCO-DERIVED NICOTINE VAPOR PRODUCTS; AND 2) REALLOCATING FROM CERTAIN HEALTH-RELATED PROGRAMS AND OTHER STATE PURPOSES PORTIONS OF THE EXISTING REVENUE FROM TAXES ON TOBACCO AND NICOTINE PRODUCTS AND MONEY THE STATE RECEIVES FROM TOBACCO LITIGATION SETTLEMENTS?

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

A. Initiative #315 violates the single subject requirement in the Colorado Constitution.

1. By diverting funding from an array of unrelated programs, described in the titles only under the generalized grouping as “certain health-related programs **and other state purposes**,” (emphasis added) the measure contains multiple subjects. *In re Interrogatory Propounded by Governor Roy Romer on House Bill No. 1353, 738 P.2d*

371, 373 (Colo. 1987) (“increase in the moneys available to the state” was a “common feature that is not sufficient to qualify the bill as one containing no more than one subject”). A key purpose of the single subject requirement is to guard against “uninformed voting caused by items concealed within a lengthy or complex proposal.” *In re Proposed Initiative “Public Rights in Waters II”*, 898 P.2d 1076, 1079 (Colo. 1995). That purpose is frustrated by the Proponents’ varied choices about withdrawal of funding under #315.

2. The measure creates a nicotine vapor product tax and makes that tax and that “regulatory structure,” including “collection of the tax,” effective “[n]otwithstanding any other provision of law.” Proposed Section 39-28.6-105. This clause is intended to preempt voter adoption of a competing measure that adopts a “nicotine product” and “vaping product” tax. *See, e.g.*, Initiatives 2019-2020 #287-292. This attempt to amend and evade the current requirements in law, C.R.S. § 1-40-123(2) (“in case of adoption of conflicting provisions, the one that receives the greatest number of affirmative votes prevails in all particulars as to which there is a conflict”), is an additional subject.
3. The measure withdraws state cigarette tax revenue if a local jurisdiction enacts a ban of “tobacco and nicotine products in any form.” #315 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 of 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 #315’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.

#315 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 #315 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”).

B. The titles set for Initiative #315 are incomplete and misleading in describing the measure’s central features to voters.

1. The title is misleading by suggesting that the nicotine vapor product tax is either constitutional (“*SHALL STATE TAXES BE INCREASED \$6,300,000 ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION...*”) or is both constitutional and statutory (“*SHALL STATE TAXES BE INCREASED \$6,300,000*”).

ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION AND A CHANGE TO THE COLORADO REVISED STATUTES...”). In fact, the tax is only statutory but voters would not know that important fact from the titles.

2. The reference to “other state purposes” in the title is so nebulous as to be entirely non-descriptive and meaningless to voters. The titles must contain an adequate summary of programs from which funds are being diverted to achieve different policy objectives. The Supreme Court requires “an initiative’s title to provide enough information that a voter, ‘whether familiar or unfamiliar with the subject matter of a particular proposal, [can] determine intelligently whether to support or oppose such a proposal.’” *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 23, 328 P.3d 155, 162 (citation omitted). This gap in providing information to voters does not meet that test.
3. 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.

4. The titles fail to set forth the major funding cuts mandated by #315 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 #315'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 #315, rather than having to 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 #315.

WHEREFORE, the Title Board should reverse its decisions of April 15, 2020 as to Initiative #315.

Respectfully submitted this 22nd day of April, 2020.

s/ Mark G. Grueskin
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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 #315, was sent this 22nd day of April, 2020 by email to counsel of record for the designated representatives at:

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