BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Kenneth Nova, Objector,

vs.

Juliet Sebold and Monica R. Colbert, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2019-2020 #70

Kenneth Nova, registered elector of the State of Colorado, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2019-20 #70 ("Establishment of Expanded Learning Opportunities Program with New Tax on Nicotine Products").

The Title Board set a title for #70 on April 17, 2019. At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

> *SHALL STATE TAXES BE INCREASED $4,100,000 ANNUALLY BY A CHANGE TO THE COLORADO REVISED STATUTES CONCERNING THE CREATION OF AN EXPANDED LEARNING OPPORTUNITIES PROGRAM THAT PROVIDES OUT-OF-SCHOOL LEARNING EXPERIENCES, SUCH AS TUTORING, SUPPLEMENTAL INSTRUCTION IN READING, MATH, SCIENCE, AND WRITING, SUPPORT FOR STUDENTS WITH SPECIAL NEEDS, ENGLISH AND FOREIGN LANGUAGE PROGRAMS, AND ARTS, CAREER, OR TECHNICAL EDUCATION TRAINING, FOR ANY COLORADO CHILD AGED 3 TO 18, AND, IN CONNECTION THEREWITH, CREATING AN INDEPENDENT AGENCY WITHIN THE DEPARTMENT OF EDUCATION TO OVERSEE THE PROGRAM AND SELECT A NON-PROFIT TO ADMINISTER THE PROGRAM; ALLOWING A 100% INCOME TAX CREDIT, SUBJECT TO SPECIFIED CAPS, TO ANY TAXPAYER WHO MAKES A CONTRIBUTION TO THE ADMINISTERING NON-PROFIT TO FUND THE PROGRAM; REQUIRING THE ADMINISTERING NON-PROFIT TO PROVIDE NEED-BASED FINANCIAL AID TO PARENT-DIRECTED INDIVIDUAL LEARNING ACCOUNTS FOR PARTICIPATING STUDENTS AND TO SELECT AND CERTIFY PROVIDERS OF SUCH EXPERIENCES; LEVYING A TAX ON SALES OF DEVICES USED TO VAPORIZE NICOTINE AND CONTAINERS OF NICOTINE USED WITH SUCH DEVICES AT THE RATE OF 5 CENTS PER DEVICE OR MILLILITER OF NICOTINE;*

REQUIRING THE TAX REVENUE TO BE USED TO FUND THE ADMINISTRATIVE AND OPERATIONAL EXPENSES OF THE AGENCY; AND EXEMPTING THE TAX REVENUE FROM ALL REVENUE AND SPENDING LIMITATIONS AS A VOTER-APPROVED REVENUE CHANGE?

I. The Title Board lacks jurisdiction over Initiative #70, as it violates the Constitution's single subject requirement.

A. Initiative #70 contains two subjects – a general tax increase and the substantive program relating to certain learning programs.

There is no linkage between the program and the tax portions of this initiative. The tax revenue is limited to payment of administrative and operational expenses. However, those expenses are far less than the $2.3 million in the first partial fiscal year and the $4,100,000 of tax revenue in subsequent fiscal years, as estimated by the fiscal impact statement. The only tax revenue actually expended from the nicotine delivery device tax is estimated to be $385,481 in the first fiscal year, $748,963 in the first full fiscal year, and $1,073,295 in subsequent fiscal years.

Thus, the taxing aspect of this measure actually creates much more revenue for non-program purposes than for the administrative and operational expenses. In fact, since the measure prohibits the use of tax revenues on the learning programs to be funded, the tax has no material relationship to the balance of the measure and thus violates the single subject requirement.

B. Initiative #70 contains two unrelated subjects designed to attract voters' interest – a tax on nicotine delivery systems and a newly created supplemental learning program.

This measure has been designed with the "log rolling" characteristics that the single subject requirement was intended to avoid – joining unrelated subjects that appeal to different elements of the electorate. *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52 at ¶¶ 32-33 (Colo. 2014). This concern applies equally where one of the subjects of a measure is tax-related and the other addresses fiscal policies of the State, such as #70's tax credit scheme. *See In re Proposed Initiative for 1997-1998 #30*, 959 P.2d 822, 827 (Colo. 1998) (invalidating decision of Title Board to set title). Therefore, the measure violates the single subject requirement, and no title should have been set.

II. Even if the Title Board has jurisdiction, the titles set are legally flawed because they titles fail to inform voters of certain central elements of the measure or misstate those aspects of the Initiative #70.

A. The titles conceal key parts of the tax increase by dispersing throughout the ballot title and submission clause.

The title separates the tax increase amount – at the beginning of the title – from the actual tax on nicotine delivery devices, the limited use allowed for such tax revenue, and the treatment of the question as a "voter-approved revenue change." *In re Title, Ballot Title and Submission Clause, and Summary for Initiated Constitutional Amendment Concerning Limited Gaming in Antonito,* 873 P.2d 733, 742 (Colo. 1994) ("In order to correctly and fairly express the true intent and meaning of the Initiative, all provisions solely concerning Antonito must be grouped together, and not separated and placed like bookends at both the beginning and the end of the title and submission clause. Grouping together related material is necessary to alert voters and petition signers that the Initiative not only involves limited gaming in Antonito, but also changes the provisions regulating limited gaming in all other areas in which limited gaming is lawful").

B. The titles are silent as to 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 million but, instead, use the meaningless euphemism, "specified caps." *See* Proposed Section 39-22-121.5(2).

2. The titles do not state that the tax credit may be claimed by "any individual, trust, estate, or corporation." *See* Proposed Section 39-22-121.5(1).

3. The titles do not inform voters that students need not be persons "residing in Colorado" or enrolled in a public schools in Colorado, as a person is an "eligible student if he or she is "otherwise eligible for admission to public school within the state." *See* Proposed Section 22-86.1-102(4) at p. 2 of Initiative (definition of "eligible student").

4. The titles do not state that the nicotine delivery system tax proceeds must be used "**exclusively**" administrative and operational expenses of the agency. *See* Proposed Section 39-28.6-104(1) at p. 9 of Initiative.

5. The titles do not state that "no revenue collected" from the nicotine delivery system tax can be used on the individual learning accounts authorized. *See* Proposed Section 39-28.6-104(1) at p. 9 of Initiative.

6. 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 Section 22-86.1-103(2)(j)(VIII) at p. 6 of Initiative.

7. The titles do not state that the tax revenue raised far exceeds the amount that may be spent by the agency on administrative and operational expenses. *See* Fiscal Impact Statement at 4 (compare "Tax on non-tobacco nicotine products" and "State Expenditures").

8. The titles do not state the 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 Section 22-86.1-104(1)(a) at p. 6 of Initiative.

9. 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 Section 22-86.1-103(2)(j)(VI) at p. 5 of Initiative ("No eligible contribution may be earmarked… for the benefit of… any individual or class of recipients"); Proposed Section 22-86.1-103(2)(f) at p. 3 of Initiative (non-profit "shall have control over when and how financial aid is distributed").

10. 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 Section 22-86.1-103(2)(j)(VI) ("No eligible contribution may be earmarked… for the benefit of… any individual or class of recipients") at p. 5 of Initiative.

11. 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 Section 22-86.1-103(2)(f) 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").

A ballot title is invalid where it is "so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶34 (Colo. 2016). This title suffers from that infirmity.

C. The titles inaccurately describe a central element of the initiative by describing it as a "voter approved revenue change" that is "exempt" from "revenue and spending limitations".

Tax revenue from the nicotine delivery device tax is not, as a matter of law, a "voter-approved" revenue change. A voter-approved revenue change exists only where the new tax revenue from a TABOR election exceeds the amount that would trigger a spending limit election. *See Mesa Cty. Comm'rs v. State*, 203 P.3d 519, 529 (Colo. 2009) ("Subsection (4)(a) must be read in conjunction with the other provisions of article X, section 20; specifically, the subsection (7) revenue limits"). The net effect of a $4 million tax and the $300 million reduction in state revenues is that there will be less – not more – revenue because of this measure. As such, this misstatement is material, because it incorrectly leads voters to think that the State will have more revenue available for programs if this measure is passed when that understanding would be indisputably false.

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

1. The use of the word "independent" to modify the word "agency" in the titles is incorrect, given that all board members are political appointees (and thus far from being independent from any outside influence) and given that the word "independent," as used here, is a catch phrase that violates the Title Board's duty of neutrality. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #258(A) ("English Language in Education in Public Schools")*, 4 P.3d 2094, 1100 (Colo. 2000) ("as rapidly and effectively as possible" was a catch phrase because it was the kind of phrase that "tips the substantive debate surrounding the issue to be submitted to the electorate"); *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative Designated "Governmental Business"*, 875 P.2d 871, 876 (Colo. 1994) (finding catch phrase where initiative's title used "consumer protection" and "open government"); *Henry v. Baker*, 354 P.2d 490, 491 (Colo. 1960) (ballot title misleads voters by using phrase that did not accurately reflect a change of law that is attributable to the ballot measure).

2. The phrase, "expanded learning opportunities," which is used to modify the word "program" in the titles, is a catch phrase. That such catch phrase is taken directly from initiative itself does not prevent the Title Board from using alternative wording to describe the program. *In re #258(A), supra*, 4 P.3d at 1100.

3. 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.

4. The terminology of "individual learning account" is inherently misleading, as it suggests a fund that is controlled by the individual, as in "individual retirement account." *See* Proposed Section 22-86.1-103(2)(j)(VI) ("No eligible contribution may be earmarked... for the benefit of... any individual or class of recipients") at p. 5 of Initiative. The Board is not permitted to use misleading language in the titles, even if it is found in the initiative text, if that language will "impede voter understanding." *Id.*

WHEREFORE, the titles set April 17, 2019 should be reversed, due to the single subject violations addressed herein and corrected to address a lack of needed information and material misrepresentations about #70.

RESPECTFULLY SUBMITTED this 24th day of April, 2019.

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 #70** was sent this day, April 24, 2019, via first class U.S. mail, postage pre-paid, and via email to the proponents at:

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