BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

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Kenneth Nova, Objector,

vs.

Juliet Sebold and Monica R. Colbert, Proponents.

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**MOTION FOR REHEARING ON INITIATIVE 2019-2020 #74**

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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 #74.

The Title Board set a title for #74 on April 26, 2019, based on Proponents' Motion for Rehearing from the April 24 hearing. Thereupon, the Board designated and fixed the following ballot title and submission clause:

> *Shall there be a change to the Colorado Revised Statutes creating 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 child aged 3 to 18 who is eligible to attend public school in Colorado, and, in connection therewith, creating a functionally 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; and authorizing the state to annually retain and spend state revenue exceeding the state spending limit in an amount equal to the appropriation to the agency for administrative and operational expenses?*

## I. The Title Board lacks jurisdiction over Initiative #74, as it violates the Constitution's single subject requirement.

The de-Brucing language found in Proposed Section 22-86.1-103(6) at p. 6 of Initiative is an unlimited exemption from TABOR and "any other law," and is bounded only by the amount

of "any appropriation" that the General Assembly makes to the agency. *See* pp. 7-8 of Initiative. The only limits on this appropriation are that the moneys cannot be used to fund individual learning accounts or administration of the non-profit organization involved.

There is no restriction on the amount of activity this agency can be assigned by the General Assembly and thus no discernible limit on the amount of money that can be exempted from revenue and spending limits under law. At minimum, there is no way for voters to know the amount of "any appropriation to the agency for the 2020-21 state fiscal year and each fiscal year thereafter" that is TABOR-exempt because of this provision.

Further, this language stands apart from the actual appropriation language in the measure. The appropriation is only specified for two fiscal years – FY 2019-2020 and FY 2020-2021. Yet, the de-Brucing language applies to FT 2020-2021 "and each fiscal year thereafter." *Compare* Section 22-86.1-103(6) at p. 6 of Initiative and Proposed Section 22-86.1-105 at pp. 7-8 of Initiative. Thus, the measure's exemption from spending limitations is broader than the substantive measure itself.

## 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 #74.

### A. 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 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.

5. 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.

6. 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").

7. 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.

8. 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").

9. The titles are silent on the fact that unused funds must revert – without condition or limitation on their use – to the administering non-profit. *See* Proposed Section 22-86.1-103((2)(g) at pp. 3-4 of Initiative ("Any funds in the individual learning account when the student no longer qualifies as an eligible student shall revert back to the administering non-profit").

10. The titles do not state that certain eligible contributions, which must be sent by the administering non-profit to the agency within the Department of Education, are not specifically de-Bruced and therefore *are* subject to the State's spending limits found in TABOR and other applicable laws. *See* Proposed Section 22-86.1-103(2)(j)(III) at p. 4 of Initiative ("Upon termination of any agreement with the agency, the administering non-profit shall remit all eligible contributions in its possession or control… to the agency").

11. The title is misleading in referring to de-Brucing of appropriations made for "administrative and operational expenses" when the measure authorizes appropriations equaling either $2 million or "the actual expenses incurred in *establishing* and operating the agency." *See* Proposed Section 22-86.1-105 at pp. 7-8 of Initiative.

12. The title is also misleading by referring to de-Brucing of "administrative expenses" as such expenses are required to be paid, first, from "gifts, grants, and

donations that may be retained and spent on administrative expenses" rather than by any amount of an annual appropriation. Of this grouping of revenue sources, only "gifts" are exempt from TABOR's definition of "fiscal year spending." Colo. Const., art. X, sec. 20(2)(c). Thus, "grants" and "donations" that are accepted will be counted toward the spending limit. *See* Proposed Section 22-86.1-103(5) at p. 6 of Initiative.

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.

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

1. 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 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").

2. 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.

3. 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 26, 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 #74.

RESPECTFULLY SUBMITTED this 29th 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 #74** was sent this day, April 29, 2019, via email to counsel for the proponents at:

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Erin Holweger