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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #20 (Severance Taxes on Oil and Gas) **Petitioners:** Andrew J. O'Connor and Mary E. Henry, v. **Respondent:** Chad Vorthmann, and **Title Board:** Suzanne Staiert, Shannon Eubanks, and David Blake.	▲ **COURT USE ONLY** ▲
Attorneys for Respondent Chad Vorthmann: Jason R. Dunn, #33011 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100; Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com	Case No.: 17SA85

RESPONDENT VORTHMANN'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 5,399 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Jason R. Dunn

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Respondent Chad Vorthmann, registered elector of the State of Colorado, through his undersigned counsel, submits his Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2017-2018 #20 (unofficially captioned "Severance Taxes on Oil and Gas").

ISSUES PRESENTED FOR REVIEW BY PETITIONERS

1. Whether the Title Board erred in declining to set title on the ground that the Title Board lacked jurisdiction.

2. Whether the Title Board denied Petitioners due process and denied Petitioners a fair and impartial rehearing by demonstrating bias and prejudice against Petitioners through the actions of Suzanne Staiert in publicly accusing Petitioner O'Connor of being dangerous and a security threat and by blaming Petitioner O'Connor for moving the rehearing from the Secretary of State's office to the Ralph L. Carr Colorado Judicial Center.

STATEMENT OF THE CASE

This original proceeding is brought by Petitioners pursuant to section 1-40-107(2), C.R.S., as an appeal from a decision of the Title Board that it lacked jurisdiction to set title on Proposed Initiative 2017-2018 #20 ("Proposed Initiative #20," the "Initiative," or the "measure").

Proposed Initiative #20 purports to change the Colorado Revised Statutes by, among other things, increasing the existing severance tax rates on oil and gas by five percentage points and eliminating a tax credit. Initiative, §§ 1–2. Petitioners, Andrew J. O'Connor and Mary E. Henry, filed an original draft of the Initiative (the "Original Draft") on March 7, 2017. Petitioners' Ex. F, Original Draft. A required review and comment hearing was held on April 7, 2017, pursuant to section 1-40-105(1). Following the hearing, Petitioners filed an amended draft of the Initiative (the "Amended Draft") and a final draft of the Initiative (the "Final Draft") with the Title Board on April 7, 2017. *See* Petitioners' Ex. F, Amended Draft and Final Draft. The Title Board

considered the Initiative on April 19, 2017, determined that it possessed jurisdiction to set title in a 2 to 1 vote,[1] and set a title.

Respondent Chad Vorthmann subsequently filed a Motion for Rehearing (the "Motion") pursuant to section 1-40-107(1)(a). Petitioners' Ex. G, the Motion. In the Motion, Vorthmann argued that the Title Board lacked jurisdiction because of numerous errors in the measure, specifically that[2]:

1. The measure's drafts fail to show changes the measure would make to existing law;

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[1] Title Board member David Blake voted at the April 19, 2017 hearing that the board lacks jurisdiction because changes made after review and comment were not highlighted or otherwise indicated in the Initiative's amended draft, in violation of section 1-40-105(4).

[2] Respondent also contended that the measure must be returned to the Proponents because: (1) the measure contains multiple separate and distinct subjects in violation of the single-subject requirement; (2) the title confuses the most important aspect of the measure, which is the increased severance tax rates; (3) the estimate in the abstract is misleading because it does not mention the proposed measure's elimination of the tax credit; and (4) the abstract fails to properly detail the measure's economic impacts and does not factor in the full extent of the measure's retroactive effect. Although addressed in the Motion, because the Title Board did not discuss these grounds and they were not part of the Title Board's decision, Respondent's Opening Brief does not address them.

2. The measure's Amended Draft fails to comply with section 1-40-105(4)'s requirement that, after the review and comment hearing, the Proponents must submit "a copy of the amended draft with changes highlighted or otherwise indicated";

3. Changes made to the measure after the review and comment hearing are so substantial that the Final Draft constitutes a new measure not subjected to review and comment;

4. Other changes made to the measure after the review and comment hearing are substantial and not in direct response to comments made at the hearing; and

5. The measure is so vague and confusing that it cannot be understood.

At the Rehearing on April 28, 2017, the Title Board considered the issues listed above and unanimously granted the Motion on the ground that the board lacked jurisdiction to set a title because, after the review and comment hearing, the Petitioners made changes to the Initiative in

the Final Draft that were not highlighted or otherwise indicated in the Amended Draft as required by section 1-40-105(4).

Although various members of the Title Board indicated at the Rehearing that the board lacked jurisdiction to set title based on the drafts' other errors, which Vorthmann raised in the Motion and were discussed at the Rehearing, the board did not vote on these issues. In addition, because the Title Board determined that it lacked jurisdiction because changes made to the Final Draft were not highlighted or otherwise indicated in the Amended Draft as required by section 1-40-105(4), the board did not consider other grounds the Motion raised, including whether the Initiative violated the constitutional single-subject and clear title requirements and whether the measure's abstract is misleading and fails to properly detail the measure's economic impacts and retroactive effect.

Petitioners subsequently filed a petition for review in this Court on May 3, 2017.[3]

SUMMARY OF THE ARGUMENT

Following the review and comment hearing, Petitioners made numerous changes to Proposed Initiative #20 in the Final Draft. A number of these changes were not indicated in the Amended Draft pursuant to section 1-40-105(4)'s requirement that, after the review and comment hearing, the Proponents must submit "a copy of the amended draft with changes highlighted or otherwise indicated." Although the Proponents literally highlighted the sections in the Amended Draft *where* some of the changes were made from the Original Draft to the Final Draft, the Amended Draft does not indicate in any manner *what* changes were actually made. Moreover, the Proponents did not literally highlight certain sections where other changes were made, including substantive changes, and the Final Draft still contains numerous

[3] Petitioners' petition for review is signed and submitted by Andrew O'Connor as "Attorney for Petitioner." Petition for Review, at 5. Andrew O'Connor is not listed as an attorney by the Office of Attorney Regulation Counsel or by the Colorado Bar Association. Upon information and belief, Petitioner O'Connor was once a registered attorney in Florida but is no longer eligible to practice law in Florida.

typographical errors. Therefore, the Proponents did not comply with section 1-40-105(4), and thus the Title Board correctly determined that it lacked jurisdiction to set title and that the measure should be returned for further drafting.

STANDARD OF REVIEW

As the gatekeepers to the initiative process, the Title Board decides whether an initiative violates section 1-40-105, which governs whether changes made to an initiative divest the board of jurisdiction to set a title. Because the Title Board reviews a multitude of initiatives every election cycle and is in the best position to make this determination, this Court, in reviewing a challenge to the board's decision, "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's actions." *In re Title, Ballot, Title and Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010).

ARGUMENT

This Opening Brief addresses only the first of the two issues raised by Petitioners on appeal: whether the Title Board erred in

declining to set title on the ground that the board lacked jurisdiction. Respondent Vorthmann defers to the Title Board on the second issue, which concerns whether the board acted unconstitutionally and wrongfully, and specifically addresses whether a board member should have recused herself from the Rehearing.

I. The Title Board may reverse its initial decision at a rehearing.

Petitioners make only *one* argument regarding the Title Board's decision that it lacked jurisdiction: that the board had no authority to reverse itself once it had ruled at the initial hearing that it had jurisdiction to set a title. *See* Petition for Review, at 4. Section 1-40-107(1)(a)(I), however, states that "any registered elector who is not satisfied with a decision of the title board . . . may file a motion for a rehearing." The motion for rehearing then "shall be heard at the next regularly scheduled meeting of the title board" and "[t]he decision of the title board on any motion for rehearing shall be final." C.R.S. § 1-40-107(1)(c). Therefore, section 1-40-107 specifically contemplates the procedural posture to this point: a registered elector can file a motion for rehearing and the Title Board can reverse its earlier decision at the

rehearing. If this could never be the case, a registered elector's right to a rehearing would be meaningless. *See People v. District Court*, 713 P.2d 918, 921 (Colo. 1986) ("Where possible, the statute should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts."). Thus, Petitioners' argument that the Title Board may not reverse itself on rehearing is without merit.

Moreover, Petitioners mischaracterize the content of Vorthmann's arguments at the Rehearing by stating that Vorthmann "filed motion for rehearing which contained and repeated the same exact arguments that were summarily rejected by the Title Board." Petition for Review, at 2. Although the Title Board considered some of the same arguments at the Rehearing as at the earlier April 19, 2017 hearing, Respondent Vorthmann supplemented these arguments and made additional arguments in the Motion and at the Rehearing. These additional arguments and explanations provided clarity to the Title Board and spurred discussions at the Rehearing that ultimately led to the board's decision that it lacked jurisdiction to set title.

II. The Title Board correctly determined that it lacked jurisdiction to set title because the measure's amended draft fails to comply with section 1-40-105(4).

Turning to the substance of whether the Title Board correctly determined that it lacks jurisdiction, section 1-40-105(4) requires Proponents to submit a copy of an amended draft if they make changes to the measure after the review and comment hearing. This draft must have the "changes highlighted or otherwise indicated." C.R.S. § 1-40-105(4). Despite this statutory requirement, *none* of the changes Proponents made from the Original Draft to the Final Draft were "indicated" so that a voter could ascertain what changes were made. Moreover, although the Proponents literally highlighted in the Amended Draft the sections where *some* of the changes were made between the Original Draft and the Final Draft, the Proponents did not highlight sections where other changes were made, and the Final Draft still contains numerous typographical errors. Therefore, the Title Board correctly determined that it lacked jurisdiction to set title.

The requirement that each and every one of the changes be indicated in an amended draft is an important part of the process, as it

provides the voting public and the Title Board with notice of what changes were made after the review and comment hearing. Therefore, the statutory requirements are designed to provide proponents and the voting public alike with a straightforward citizen initiative process. *See, e.g.*, C.R.S. § 1-40-105(3) ("To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters."); C.R.S. § 1-40-105(2) ("If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition must be resubmitted [for another review and comment hearing]."). If these changes are not indicated, unsuspecting members of the public may be left unaware of specific alterations that directly affect them. This requirement also ensures that proponents do not try and hide controversial provisions in the measure's final draft that were not in the original draft or discussed during the review and comment hearing.

A. The changes made to the Initiative were not "highlighted or otherwise indicated" in the Amended Draft.

Section 1-40-105(4) expressly requires that changes made from the original draft to the final draft must be "highlighted or otherwise indicated" in an amended draft submitted to the Title Board.[4] The necessity of this requirement is obvious: the Title Board and the public must be able to discern what changes were made after the review and comment hearing to ensure that the measure before the board has been subjected to the review and comment process. Although the Proponents literally highlighted the places in the Amended Draft where some of the changes were made in the Final Draft, the changes actually made were not shown in such a way that a person reading the Amended Draft reasonably would know the exact changes made between drafts. *See*

[4] Although the Title Board did not definitively decide whether merely "highlighting" where language was changed, added, or removed satisfies section 1-40-105(4), this Court may clarify that "highlighted or otherwise indicated" requires showing what changes were actually made between drafts via a redline, strikethrough, or other similar means. At least one board member expressed at the Rehearing that "highlight" means something different than literally highlighting. *See* 1:17:04 in "Title Board – April 28, 2017 – Part 2," *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

Petitioners' Ex. F, Amended Draft. Section 1-40-105(4) requires showing *what* changes were made, not just *where* the changes were made. Therefore, the Proponents failed to meet both the text of, and the purpose behind, section1-40-105(4).

For example, the Amended Draft highlights the tax rates for oil and gas in section 39-29-105(1)(c) of Section 2 of the measure and the word "thirty" in section 39-29-110.5(2)(I) of Section 5 of the measure. *See* Petitioners' Ex. F, Amended Draft, at 2, 5. Because the sections where changes were made are highlighted in the Amended Draft but the changes themselves are not indicated, the Amended Draft does not indicate whether these highlighted provisions were added to, changed, or removed. This lack of clarity is amplified by the fact that the change in rates in Section 2 were *added* in the Final Draft, while the word "thirty" in Section 5 was *changed* to "forty" in the Final Draft. Therefore, even the highlighting that was attempted is not uniform in how it indicates what types of changes were made. Only by meticulously comparing the Original Draft with the Final Draft, or by

running a redline comparison, do the changes become clear. *See* Respondent's Ex. 1, Redline Comparison.[5]

B. The Amended Draft fails to indicate, or even highlight, certain substantive changes.

The Proponents also made substantive changes between the Original Draft and Final Draft that are not highlighted or denoted in any manner in the Amended Draft. For example, the Proponents deleted from section 39-29-110.5(2)(II) of Section 5 the following language but did not highlight or otherwise denote this change:

> C.R.S., AND LOCAL DISTRICT COLEGES [SIC] AS DEFINED BY SECTION 23-72-121.5, C.R.S, AND LOCAL DISTRICT COLLEGES AS DEFINED BY SECTION 23-72-212.

Petitioners' Ex. F, Original Draft, at 5. Section 39-29-110.5(2)(II) of Section 5 of the measure requires that 30 percent of the tax revenue that is placed in an operational account from the increased tax rates on oil and gas shall be directed to scholarships for Colorado residents. The Original Draft described that the scholarships would go to Colorado

[5] Exhibit 1 is not part of the official record in this matter and is submitted only as a demonstrative exhibit to help the Court's understanding of the changes made between the Original Draft and Final Draft.

residents attending both "state institutions of higher education" *and* "local district colleges." *See* Petitioners' Ex. F, Original Draft, at 5. However, the Final Draft removed the reference to "local district colleges," which are two-year community and technical colleges in the state pursuant to section 23-60-201. *See* Petitioners' Ex. F, Final Draft, at 5.

A voter who read the Original Draft and is in favor of money going to "local district colleges" would not know from the Amended Draft that the Proponents changed the measure to remove money going to "local district colleges" because no such indication was made. Petitioners' Ex. F, Amended Draft, at 5. This substantive change is in addition to new subsection titles that changed from the Original Draft to the Final Draft and 11 corrected typographical errors,[6] all of which are not marked as changed in the Amended Draft. *See* Petitioners' Ex. F, Amended Draft.

[6] There are at least four typographical errors in the Final Draft that presumably still need correction, including the misspellings of "establishing," "guidelines," and "environment," and a missing comma in section 39-29-110.5(2)(III) of Section 5 of the measure. *See* Petitioners' Ex. F, Final Draft, at 5–6.

C. The Amended Draft did not substantially comply with section 1-40-105(4).

The Proponents contended at the Rehearing that the Amended Draft complies with section 1-40-105(4) under the substantial compliance doctrine discussed in *Armstrong v. O'Toole*, 917 P.2d 1274 (Colo. 1996). *Armstrong* held that the differences between the measure's original draft and final draft that were not "highlighted or otherwise indicated" in the amended draft were "technical and grammatical," and thus the proponents in that case substantially complied with section 1-40-105(4). *Id.* at 1276.

If *Armstrong* and its substantial compliance standard apply here, it is inapposite to this case for at least two reasons. First, the changes that were "highlighted or otherwise indicated" in the amended draft in *Armstrong* were shown with "interlineation," *Armstrong*, 917 P.2d at 1276; the proponents did not merely highlight in the amended draft the places where changes were made in the final draft, as occurred here. Black's Law Dictionary defines "interlineation" as "[t]he act of writing something between the lines or an earlier writing" or "[s]omething written between the lines of an earlier writing." Black's Law Dictionary

938 (10th ed. 2014). In other words, the proponents in *Armstrong* actually indicated *what* changes were made between drafts by writing the changes in the text of the amended draft. The Proponents here did not interlineate the changes or otherwise indicate what changes were made. *See* Petitioners' Ex. F, Amended Draft.

Second, the changes the proponents did not interlineate in *Armstrong* were "technical and grammatical" in nature, and thus did not affect voters ability to see what substantive changes were made between drafts. Here, the Amended Draft fails to indicate substantive changes, as described above, in addition to technical and grammatical changes.

Therefore, when taken collectively, if not individually, the proposed measure's numerous violations of section 1-40-105(4) demonstrate that the Proponents did not substantially comply

with the statute.[7] These violations unquestionably warrant a return of the measure to the Proponents to correct these deficiencies and for a new review and comment hearing. Therefore, the Title Board did not err in deciding that it lacked jurisdiction to set title.

III. The Title Board lacked jurisdiction to set a title for numerous other reasons.

As set forth in the Motion, the Title Board lacked jurisdiction for four other reasons, which the Title Board addressed but did not vote on at the Rehearing: (1) the drafts fail to show changes the measure would

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[7] *Armstrong* notes that the factors for assessing substantial compliance include:

> (1) the extent of the proponents' non-compliance, that is, whether the proponents systematically disregarded the statutory requirements or whether their divergence was an isolated instance; (2) the purpose of the statutory provision and whether that purpose is substantially achieved despite the non-compliance; and (3) whether it can reasonably be inferred that the proponents made a good faith effort to comply or whether the non-compliance is more properly viewed as an attempt to mislead the electorate.

917 P.2d at 1276 (citing *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994)). Although there is no indication that the Proponents did not make a good faith effort to comply, the purpose of section 1-40-105(4) was not substantially achieved—voters cannot adequately assess what changes were made between the Original Draft and the Final Draft—and the divergence from the statutory requirements was not an isolated instance. *See, e.g.*, *infra* Respondent's Opening Brief, at § III.

make to existing law; (2) changes made to the measure after the review and comment hearing are so substantial that the Final Draft constitutes a new measure not subjected to review and comment; (3) other changes made to the measure after the review and comment hearing are substantial and not in direct response to comments made at the hearing; and (4) the measure is so vague and confusing that it cannot be understood.

A. The drafts fail to show changes the measure would make to existing law.

The heart of Proposed Initiative #20 dramatically increases (by 100% to 350%) the severance tax rate on oil and gas production. But neither the original draft submitted for review and comment nor the final version submitted to the Title Board show this change. Both the original and final version simply state in section 39-29-105(1)(b) of Section 2 of the measure that the tax rates before January 1, 2018, will retroactively become:

Under $25,000	7%
$25,000 and under $100,000	8%
$100,000 and under $300,000	9%
$300,000 and over	10%

Petitioners' Ex. F, Original Draft, at 2; Final Draft, at 2.

The majority of changes Proposed Initiative #20 would make to existing law are indicated in its drafts by capital letters. The measure's drafts, however, do not mark or otherwise indicate that the tax rates listed above have been significantly increased from 2%, 3%, 4% and 5%, respectively. Not only are these increases substantial, ranging from 100% to 350%, but they are indisputably a central feature of the measure. Such changes easily could have been indicated by putting the text surrounding the income levels in capital letters and by using a strike-through or other means to denote the changes to the percentages.

In addition, the tax rates added in section 39-29-105(1)(c) of Section 2 of the Final Draft were not part of the Original Draft, but likewise are not marked in any way. *See* Petitioners' Ex. F, Original Draft at 2; Final Draft at 2. A person asked to sign the petition or a voter considering the measure will not know that the measure adds these new tax rates to law. In fact, because the text is not in capital letters, unlike the text for the other changes the measure makes to existing statutes, a voter is *more likely* to think that these percentage

rates already exist in statute.[8] These changes not only are a central feature of the measure, but they would result in a tax increase of hundreds of millions of dollars annually.

Because the heart of this measure is the increase in severance tax rates, the failure to properly indicate these proposed changes and additions to the rates would mislead voters and cause confusion. This failure is another reason the Title Board lacked jurisdiction and why the board correctly determined that the measure should be returned for further drafting.

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[8] Indeed, the confusion created by these drafting errors (whether intentional or otherwise) played out at Title Board's April 19, 2017 hearing. The draft of the title presented at the hearing stated that measure would increase "the existing severance tax on oil and gas by 5%." One of the Proponents argued that the title should say "10%" instead. Because the drafts of the measure did not show what changes were made to the rates, the Title Board struggled to determine what number to place in the title. In fact, the issue was clarified only when one Title Board member resorted to looking up the rates in current statute and confirmed that the measure would increase the existing rates by 5 percentage points (not 5%). Audio of this discussion begins at 1:04:40 in "Title Board – April 19, 2017 – 9:30 a.m.," *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

B. Changes made after the review and comment hearing are so substantial that the Final Draft constitutes a new measure not subjected to review and comment.

Section 1-40-105(1) requires that the original draft of a proposed measure must be submitted for review and comment. The Colorado Supreme Court has interpreted this statutory section to mean that when "the adoption of language in a subsequent draft of a proposal [] substantially alters the intent and meaning of central features of the initial proposal," "the revised document in effect constitutes an entirely different proposal" and "must be submitted to the legislative offices for comment." *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs,* 830 P.2d 963, 968 (Colo. 1992) (noting that the proposed measure at issue was originally intended to permit limited gaming only in the city of Idaho Springs until the subsequent draft substantially altered this central feature to apply to cities outside of Idaho Springs). The Court elaborated on the purpose behind this requirement:

> The public's right to understand the contents of an initiative in advance of its circulation would be completely eradicated if the intent and meaning of the central features of a proposal submitted to the Board for the purpose of fixing a

> title thereto is substantially different from the intent and meaning of the central features of an earlier version thereof that was submitted to the legislative offices.

Id.

Like the subsequent draft in *In re Limited Gaming*, the Final Draft for Proposed Initiative #20 contains substantial alterations that fundamentally modify the measure and thus require a new review and comment hearing for notice to the public. In contrast to Proposed Initiative #20's Original Draft, which significantly increased the tax on oil and gas for gross incomes under $300,000 before January 1, 2018, but did not tax oil and gas at all for those gross income levels starting on January 1, 2018, the Final Draft adds increased tax rates on oil and gas for gross incomes under $300,000 that would apply starting January 1, 2018. *See* Petitioners' Ex. F, Original Draft at 2; Final Draft, at 2.

This change inevitably would cause voter surprise. For example, a small oil or gas producer who read the Original Draft and saw that its tax rate was zero starting on January 1, 2018, would be more than surprised to learn that the Final Draft completely reversed course and

states that its tax for after January 1, 2018, could be more than triple its current tax rate. Although such a change was discussed at the review and comment hearing,[9] this substantial change did not provide sufficient notice to the public and divests the Title Board of jurisdiction.[10]

C. Other changes made after the review and comment hearing are substantial and not in direct response to comments made at the hearing.

Section 1-40-105(2) specifies when substantial changes not in direct response to comments made at review and comment divest the Title Board of jurisdiction:

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[9] Unlike here, where the proponents made the change in response to a comment at the review and comment hearing, the proponents in *In re Gaming* "consistently indicated that their proposal was directed to limited gaming in that city" only, contrary to the proponent's changes in their final draft. *Id.* at 967–68. However the overall holding of the case—that changes made to a proposed measure may be so substantial as to require a new review and comment hearing—applies. *See id.* at 968 (noting that the purpose of the review and comment hearing "is to encourage linguistic refinement of drafts of proposed initiatives" but not to "alter[] the intent and meaning of central features").

[10] Although the Title Board did not vote on this argument at the Rehearing, board member Suzanne Staiert indicated that she found this argument "compelling." Audio of this discussion begins at 1:19:30 in "Title Board – April 28, 2017 – Part 2," *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

> If any substantial amendment is made to the petition [after the review and comment hearing], other than an amendment in direct response to the comments of the directors of the Legislative Council and the office of legislative legal services, the amended petition must be resubmitted to the directors for comment . . . .

Proposed Initiative #20 violates this subsection because the Final Draft removes a proposed addition to section 24-75-1201 in Section 6 of the measure that would place some of the money from the severance tax into a clean energy fund. *See* Petitioners' Ex. F, Original Draft, at 6; Final Draft, at 6.

At the review and comment hearing and in Question 21 of the review and comment memorandum, the Proponents were told that that section 24-75-1201 was repealed, but that there is a similar clean energy provision in section 24-38.5-102.4(1)(a)(I). The memorandum specifically asks: "Does the proponent wish to amend this existing section?" Respondent's Ex. 2, Review and Comment Memorandum, at 5. But rather than simply correcting this statutory cross-reference, the Proponents deleted the reference altogether, and instead elected to increase by 10 percentage points education funding in section 39-29110.5(2)(I) of Section 5 in the final draft. *See* Petitioners' Ex. F, Final

Draft, at 5–6. That change cannot be said to be in direct response to the comment that merely proposed changing the statutory citation to the correct clean energy provision. Instead, it constitutes a fundamental change to the measure and to the programs funded by the tax increase. Thus, the measure must be returned for additional review and comment and the public notice provided thereby. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 251 (Colo. 2000) (explaining that the process "permits the proponents to benefit from the experience of experts in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process").

D. The measure is so vague and confusing that it cannot be understood.

Ultimately, Proposed Initiative #20 is simply so vague and confusing that the Title Board cannot reasonably understand it and set a title it without guessing what the measure means. In the Motion, Respondent Vorthmann identified six separate instances where Legislative Council struggled to understand the measure and asked a variety of clarifying questions at the review and comment hearing.

Petitioners' Ex. G, the Motion, at 6–8. The Proponents either did not answer Legislative Council's questions or answered them in such a manner as to cause even greater confusion.

The most illuminating example is the issue of whether the measure would have retrospective effect. The plain text of the measure indicates that the raised tax rates on oil and gas would apply beginning in 2000 and thus have retrospective effect for the years 2000 to 2017. *See* Petitioners' Ex. F, Original Draft, at 1–2; Final Draft, at 1–2. At the review and comment hearing, Legislative Council asked: "If voters approve the measure in November 2017 and it becomes effective after January 1, 2018, then would the change be retrospectively changing the taxes for 2017?" Respondent's Ex. 2, Review and Comment Memorandum, at 3. The Proponent first responded "no," but then changed his answer to "would it?"[11] After Legislative Council responded that the measure's language indicated that the measure would in fact retrospectively change taxes, the Proponent changed his answer to

[11] Audio of this discussion begins at 24:15 in "Initiative 2017-2018 #20 Review and Comment Hearing," *available at* http://leg.colorado.gov/committee/granicus/964136.

"yes." A similar discussion occurred between the Proponents and the Title Board at the Rehearing.[12] Whether the measure would retrospectively change taxes is a vitally important question. If the measure would retrospectively change taxes, as it appears it would do, then the Title Board would need to state the measure's retrospective effect in the title and adjust the dollar figure in the title accordingly.

This is one example of why the measure is too vague and confusing for the Title Board to have jurisdiction to set a title. Other examples are in listed in the Motion, but because the Title Board did not rule on those, this brief does not detail them here. Petitioners' Ex. G, the Motion, at 6–8.

CONCLUSION

The Title Board correctly determined that it lacked jurisdiction to set a title for Proposed Initiative #20 because, after the review and

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[12] Audio of this discussion begins at 12:45 in "Title Board – April 28, 2017 – Part 2," *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html. In addition, at least one board member cited retroactivity as a supplemental reason to deny jurisdiction. *See* 1:20:07 in "Title Board – April 28, 2017 – Part 2," *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

comment hearing, the Petitioners made changes to the measure in the Final Draft that were not highlighted or otherwise indicated in the Amended Draft as required by section 1-40-105(4). Respondent Vorthmann therefore respectfully asks this Court to affirm the Title Board's grant of his Motion for Rehearing.

Respectfully submitted this 17th day of May 2017.

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/s/ Jason R. Dunn
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Attorneys for Respondent Chad Vorthmann

CERTIFICATE OF SERVICE

I hereby certify that on May 17th, 2017, I electronically filed a true and correct copy of the foregoing **RESPONDENT VORTHMANN'S OPENING BRIEF** via the Colorado Courts E-Filing System on all counsel of record and separately emailed to Petitioners:

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