

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #299 (“Petitions”)</p> <p><b>Petitioner: Kelly Brough</b></p> <p>v.</p> <p><b>Respondents: Mike Spalding and Chip Creager</b></p> <p><b>and</b></p> <p><b>Title Board: Theresa Conley, Jason Gelender, and David Powell</b></p>	<p>DATE FILED: May 6, 2020 3:10 PM</p> <p>▲ COURT USE ONLY ▲</p>
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<p><b>PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #299 (“PETITIONS”)</b></p>	

## CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

Choose one:

It contains 1,487 words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

*s/ Thomas M. Rogers III*

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## STATEMENT OF THE ISSUES

Whether the Title Board erred in setting titles for #299 because the measure's treatment of the single subject requirement of current law is inconsistent and renders the measure so vague, unclear and incomprehensible that the measure's meaning cannot be ascertained.

## STATEMENT OF THE CASE

### A. Statement of Facts.

Mike Spalding and Chip Creager (the "Proponents") proposed Initiative 2019-2020 #299 ("Initiative #299" or "#299"). The measure would make numerous changes to procedures for state and local ballot initiatives and referenda. One provision of the measure would expressly repeal art. V, sec. 1(5.5) of the Colorado constitution, which prohibits ballot measures containing more than one subject. *See* #299, sec. 5. The measure also makes a contradictory reference to "protests...to enforce the state single subject rule, **which remains in effect.**" *Id.* at sec. 1(1) (emphasis added). The titles for #299 do not address the measure's repeal of the single subject rule.

### B. Nature of the Case, Course of Proceedings, and Disposition Below.

A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter,

Proponents submitted final versions of the Proposed Initiative to the Secretary of State for submission to the Title Board, of which the Secretary or her designee is a member.

A Title Board hearing was held on April 1, 2020, at which time titles were set for 2019-2020 #299. On April 8, 2020, Petitioner Kelly Brough filed a Motion for Rehearing, alleging *inter alia*, that the titles set were legally flawed because they failed to inform voters of certain central elements of the measure and would mislead voters, and that the Title Board should not have set a title for #299 because the measure's treatment of the single subject requirement of current law is inconsistent and renders the measure so vague, unclear and incomprehensible that the measure's meaning cannot be ascertained. Rehearing was held on April 15, 2020, at which time the Title Board denied the Motion for Rehearing.

The title set by the Board at rehearing follows:

*Shall there be an amendment to the Colorado constitution concerning initiative and referendum petitions, and, in connection therewith, allowing petitioning of all Colorado governments; changing requirements, procedures, and deadlines for: 1) circulating petitions and qualifying petitions for the ballot, including elimination of the requirement that signatures for constitutional amendments be gathered from all parts of the state, 2) protesting petitions, including changing the venue and accelerating the protest process, and 3) informing voters of petition contents, including referring voters to pro and con websites; requiring petition titles of no more than 60 words; limiting the number of bills that the general assembly may exempt*

*from referendum; repealing the requirement that an initiative to add language to the Colorado constitution be approved by 55%, rather than 50%, of the voters; allowing laws enacted by initiative to be changed only by another initiative; exempting petitions from municipal home-rule provisions; and repealing all conflicting laws?*

Initiative #299 is nearly identical to another measure filed by one of the Proponents earlier in this cycle, #245. Petitioner appealed the titles set for #245 to this Court. *See In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #245*, Colorado Supreme Court, Case No. 2020SA000091. Since the filing of the Petition for Review in this matter, the Court has affirmed the actions of the Title Board with regard to #245. The Court's order in that matter renders moot several of the issues raised in the Petition for Review in this matter. Those issues are not addressed in this Opening Brief.

### **SUMMARY OF ARGUMENT**

The Title Board erred in setting titles for #299 because the measure's treatment of the single subject requirement of current law is inconsistent and renders the measure impossible to comprehend. One provision of the measure would expressly repeal Colorado's constitutional single subject rule (*See* #299, sec. 5), while another provision provides that it "remains in effect." *Id.* at sec. 1(1). The result is an internally inconsistent and incomprehensible measure. Because the

measure cannot be understood, clear titles cannot be set, and the Title Board should have refused to do so.

## **LEGAL ARGUMENT**

### A. Standards of Review and Preservation of Issue Below.

#### **1. Standard of review.**

The Title Board must set titles that “correctly and fairly express the true intent and meaning” of the proposed initiative and “unambiguously state the principle of the provision sought to be added, amended, or repealed.” C.R.S. § 1-40-106(3)(b). However, “if the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999).

In most cases, when the Court reviews decisions of the Title Board with regard to the language chosen for particular titles, it defers to the Board’s discretion in choosing whether and how to summarize particular provisions of an initiative. *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016). However, the sole question presented here is whether the measure is so inconsistent and incomprehensible that its meaning cannot be

ascertained and titles cannot be set. In this case, where the issue presented to the Court concerns a pure question of law, this Court's review is done under the *de novo* standard. *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018).

## 2. Preservation of issues below.

The issues raised in this brief were presented to the Title Board in Petitioner's Motion for Rehearing, were considered at rehearing, and are preserved for review. *See Motion for Rehearing on Initiative 2019-2020 #299* at 2-3.

- B. The Title Board should not have set titles for #299 because the measure's treatment of the single subject requirement of current law is inconsistent and renders the measure so incomprehensible that the measure's meaning cannot be ascertained.

Initiative #299 would repeal art. V, sec. 1(5.5) of the Colorado constitution, which prohibits ballot measures containing more than one subject. *See #299*, sec. 5. The measure also makes reference to "protests...to enforce the state single subject rule, **which remains in effect.**" *Id.* at sec. 1(1), *emphasis added*. It is unclear whether these two contradictory provisions would repeal the single subject rule or leave it in effect. This inconsistency creates several fatal problems for the measure.

First, because the measure both expressly repeals the single subject provision and notes that it remains in effect, the measure is impossible to comprehend or understand. “[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25, supra*, at 465.

Second, the titles may be misleading to voters, but it is not possible to know if that is the case until our courts interpret the inconsistency. Certainly, our courts will be called upon to resolve the contradiction and to determine if the measure did or did not repeal the single subject rule if #299 passes. The titles do not inform voters that the measure would repeal the single subject rule. So, if a court later determines that the measure does, in fact, repeal the single subject rule, then under the current titles, voters will have voted on the measure without notice of this critical change in law.

Third, if the measure does leave the single subject rule in effect, it is impossible to determine what the rule would be after passage. Clearly, it would not be the single subject rule as articulated in art. V, sec. 1(5.5) of the Colorado constitution (which the measure would repeal), yet the measure offers no provision

or language to replace it. Indeed, there would be nothing left of the single subject rule except a provision of #299 that says the rule remains in effect, without specifying what the rule is. Under these circumstances, the titles cannot adequately summarize the measure for voters.

Finally, if it is later determined that the measure repeals the single subject requirement, then #299 certainly violates the current single subject rule by mingling procedural and substantive provisions. *See In re Title, Ballot Title and Submission Clause for 2003-2004 #21, #22, #32 and #33*, 76 P.3d 460, 462 (Colo. 2003) (finding a second subject where a measure combines procedural and substantive changes to existing law). Under the circumstances, the single subject of #299, if there is one, cannot be ascertained and the measure cannot be forwarded to the voters.

### **CONCLUSION**

Initiative #299 is internally inconsistent and incomprehensible such that clear titles cannot be set for the measure and it cannot be forwarded to the voters. The Court should reverse the decision of the Title Board to set titles for this flawed measure.

Respectfully submitted this 6<sup>th</sup> day of May, 2020.

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**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #299 (“PETITIONS”)** was sent electronically via CCEF this day, May 6, 2020, to the following:

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