

<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 #293 (“Tobacco Tax Revenue for New State Preschool Program”)</p> <p><b>Petitioner: Anna Jo Haynes</b></p> <p>v.</p> <p><b>Respondents: Monica Vondruska and Jon Caldara</b></p> <p><b>and</b></p> <p><b>Title Board: Theresa Conley, David Powell, and Julie Pelegrin</b></p>	<p>DATE FILED: May 6, 2020 5:15 PM</p> <p>▲ COURT USE ONLY ▲</p>
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<p><b>PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #293 (“TOBACCO TAX REVENUE FOR NEW STATE PRESCHOOL PROGRAM”)</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 3,632 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/ Mark G. Grueskin*

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**TABLE OF CONTENTS**

**ISSUES PRESENTED** .....1

**SUMMARY OF ARGUMENT** .....1

**STATEMENT OF THE CASE**.....2

A. Statement of Facts. .....2

B. Nature of the Case, Course of Proceedings, and Disposition Below. .....4

**LEGAL ARGUMENT** .....5

A. Standard of review; preservation of issue below. .....5

B. Initiative #293 violates the single subject requirement by both expanding preschool programs and penalizing local policy makers who ban “any form” of tobacco or nicotine products. .....7

C. The titles are misleading and must be corrected before being presented to potential petition signers and voters. .....12

        1. *The titles are silent about the penalty created for local jurisdictions that ban the sale of any tobacco or nicotine product.* .....12

        2. *The titles fail to inform voters about major cuts to programs from existing funds.* .....14

**CONCLUSION**.....17

## TABLE OF AUTHORITIES

### **Cases**

<i>In re Ballot Title 1997-1998 #62</i> , 961 P.2d 1077, 1082 (Colo. 1998) .....	7
<i>In re Title, Ballot Title &amp; Submission Clause 2013-2014 #90</i> , 2014 CO 63, ¶23, 328 P.3d 155, 162 .....	14
<i>In re Title, Ballot Title &amp; Submission Clause for 2015-2016 #73</i> , 2016 CO 24, ¶32, 369 P.3d 565, 570 .....	15, 16
<i>In re Title, Ballot Title &amp; Submission Clause, &amp; Summary for Petition on Campaign &amp; Political Fin.</i> , 877 P.2d 311, 315 (Colo. 1994) .....	6
<i>In re Title, Ballot Title, Submission Clause, &amp; Summary for 1999-2000 No. 256</i> , 12 P.3d 246, 254 (Colo. 2000).....	6
<i>In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55</i> , 138 P.3d 273, 282 (Colo. 2006).....	10, 12
<i>In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 # 91</i> , 235 P.3d 1071, 1077 (Colo. 2010) (“#91”) .....	passim
<i>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives #43 and #45</i> , 46 P.3d 438, 448 (Colo. 2002) .....	11
<i>In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)</i> , 920 P.2d 798, 802 (Colo. 1996).....	6
<i>In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175</i> , 987 P.2d 243, 245 (Colo. 1999) .....	5

### **Statutes**

C.R.S. §1-40-106.5(1)(e)(II).....	10
C.R.S. §1-40-106(3)(b).....	16

### **Other Authorities**

Denver Revised Municipal Code (“D.R.M.C.”) §24-405(a) .....	9
<a href="https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293Final.pdf">https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293Final.pdf</a> .....	2
<a href="https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293FiscalImpact.pdf">https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293FiscalImpact.pdf</a> .....	13

<https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293Rehearing.pdf>.....7  
<https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2019-2020/250Results.html> .....16

**Constitutional Provisions**

Colo. Const., art. V, § 1(5.5).....5, 11  
Colo. Const., art. X, § 21 .....3

## **ISSUES PRESENTED**

1. Whether the Title Board’s single subject decision was legal error, given that Initiative 2019-2020 both: (a) establishes and funds a preschool program from existing sources of tax revenue; and (b) penalizes any local jurisdiction that bans the sale of nicotine or tobacco products in any form by requiring that jurisdiction to forfeit its share of state cigarette tax revenues.
2. Whether the titles are misleading because the Board refused to inform voters that local jurisdictions will forfeit state cigarette tax revenue if they banned tobacco or nicotine products in any form.
3. Whether the titles are misleading because the Board also refused to inform voters that significant shares of tobacco settlement litigation funding will be diverted from key programs and naming such programs rather than using the uninformative phrase, “health-related programs.”

## **SUMMARY OF ARGUMENT**

Initiative #293 violates the single subject requirement in the Colorado constitution. It proposes an expansion of preschool programs and a financial penalty on any town that bans, “in any form,” tobacco or nicotine products. Attempts to curb exercise of the legislative power that are tucked into measures seeking other

ends are impermissible as single subject violations. In part, that is because voters would be surprised that the two provisions are paired. In addition, this joinder of subjects forces voters to choose which policy goal they prioritize: here, fortifying their children with preschool programs or protecting their children from tobacco and nicotine product sales in their communities. The single subject requirement was adopted to avoid precisely these impacts on voters.

In addition, the titles set are misleading because they omit key features of #293. Specifically, the titles fails to mention the mandatory forfeiture of state cigarette tax revenues by towns that ban even a single form of tobacco or nicotine products. Also, the titles fail to provide some specifics about programs that are losing funding that will now be diverted to preschool programs. Both of these errors require correction by the Title Board.

## **STATEMENT OF THE CASE**

### A. Statement of Facts.

Monica Vondruska and Jon Caldara (the “Proponents”) proposed Initiative 2019-2020 #293 (“Initiative #293” or “#293”). The final text of Initiative #293<sup>1</sup>

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<sup>1</sup> The text of #293 can be found in the materials certified by the Title Board for this appeal or at:

<https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293Final.pdf>

would amend the Colorado constitution and change the Colorado Revised Statutes by creating a new preschool program. The new preschool program is funded with the revenue generated by existing state taxes under Section 21 of Article X of the Colorado Constitution for health programs and the money the state receives from tobacco litigation settlements. As to the changed use of tobacco settlement moneys, the Proponents cherry-picked some programs from which to divert funds and skipped over others, leaving their funding from this source intact.

Beyond changing the use of existing cigarette and tobacco related revenue sources and creating a new preschool program, Initiative #293 financially penalizes any local jurisdiction that prohibits the sale of tobacco and nicotine products. In the words of the initiative, localities will lose state cigarette tax revenues if they “enact[] bans of tobacco or nicotine products in any form.” Proposed Amended Section 39-22-612(1)(a)(II)(A). This financial penalty is addressed by Section 3 of #293 as follows:

**In order to qualify for distributions of state income tax money, units of local government are prohibited from imposing taxes on any person as a condition for engaging in the business of selling cigarettes, OR ENACTING BANS OF TOBACCO AND NICOTINE PRODUCTS IN ANY FORM.** For purposes of this subsection (1)(a)(II), the "gross state cigarette tax" means the total tax before the discount provided for in section 39-28-104 (1). For any city, town, or county that was previously disqualified from the apportionment set forth in this subsection (1)(a)(II)(A) by reason of imposing a fee or license related to the sale of cigarettes, the city, town, or county is



eligible for any allocation of money that is based on an apportionment made on or after July 1, 2019, but not for an allocation of money that is based on an apportionment made before July 1, 2019. **THE TOTAL AMOUNT THAT WOULD HAVE BEEN ALLOCATED TO CITIES, TOWNS AND COUNTIES IN EACH FISCAL YEAR BUT FOR THE ADOPTION OF A BAN ON OR AFTER DECEMBER 31, 2021, SHALL BE CERTIFIED TO THE STATE TREASURER BY THE DEPARTMENT OF REVENUE AND SHALL BE CREDITED TO THE PRESCHOOL CASH FUND REFERENCED IN SECTION 22, ARTICLE X, OF THE COLORADO CONSTITUTION.**

(Emphasis added.)

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 #293. On April 8, 2020, Petitioner Anna Jo Haynes filed a Motion for Rehearing, alleging that the Title Board erred in setting a ballot title because #293 violates the single subject requirement of the Colorado Constitution, and that the Title Board erred because the titles set for #293 are incomplete in describing the measure's central features and are otherwise misleading to voters. Rehearing was

held on April 15, 2020, at which time the Title Board denied the Motion for Rehearing in its entirety.

The title set by the Board at rehearing follows:

*Shall there be an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning a new preschool program that is funded by reallocating revenue generated by existing 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 reallocating from certain health-related programs and other state purposes portions of the following existing revenue sources: 1) taxes on tobacco and nicotine products; and 2) money the state receives from tobacco litigation settlements?*

### **LEGAL ARGUMENT**

#### **A. Standard of review; preservation of issue below.**

The Colorado Constitution requires that any initiative be composed of a single subject in order to be considered by the Title Board. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title, and the measure must be returned to the proponents. *Id.*

The Board's analysis and this Court's review is a limited one, analyzing the measure with sufficient thoroughness to identify its subject or subjects. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999). A single

subject exists if an initiative's topics are "necessarily and properly" related to the subject identified by the Title Board, but the measure will be inherently flawed if the array of topics is "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 P.2d 798, 802 (Colo. 1996).

The Title Board errs in a finding a measure contains a single subject "when an initiative's provisions seek to achieve purposes that bear no necessary or proper connection to the initiative's subject." *In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 # 91*, 235 P.3d 1071, 1077 (Colo. 2010) ("#91"). Thus, this Court will examine the purposes to be achieved in order to resolve if the connection to the asserted subject is "necessary or proper."

An initiative title must "fairly summarize the central points" of the proposed measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin.*, 877 P.2d 311, 315 (Colo. 1994). The Board has achieved its assigned task when its work product results in "fair, clear, and accurate titles that do not mislead the voters." *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 No. 256*, 12 P.3d 246, 254 (Colo. 2000). The Court will generally defer to the Board's language choices unless the titles set "contain a

material and significant omission, misstatement, or misrepresentation.” *In re Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998).

The single subject issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. *See* Anna Jo Haynes’ Motion for Rehearing on Initiative 2019-2020 #293 at II.A.1, B.1, and B.6.<sup>2</sup>

B. Initiative #293 violates the single subject requirement by both expanding preschool programs and penalizing local policy makers who ban “any form” of tobacco or nicotine products.

This Court has shown a clear concern for single subject violations where measures both enact a particular policy objective and then also quietly insert a ban on policy making that would be a surprise to voters. This combination of disparate objectives – enacting one policy and then preventing legislators from acting as to a separate one – triggers all of the single subject concerns that led to the enactment of this requirement in the first place.

For instance, where a measure created a container tax and those proceeds were used to fund water-related programs, the initiative’s accompanying limit on the

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<sup>2</sup> The Motion for Rehearing can be found in the materials certified by the Title Board for this appeal or at: <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293Rehearing.pdf>

General Assembly's authority in connection with certain water programs and agencies was a second subject.

While many of Initiative # 91's provisions relate to a beverage container tax and its administration, coiled in the folds of this initiative is a **separate and distinct subject that would negate the power of the General Assembly to exercise legislative supervision** over the basin roundtables and the interbasin compact committee, or create or empower any other agency to supersede or be superior to them, until the year 2015, while also embedding these entities into the water sections of the Colorado Constitution and vesting in them new authority over Colorado water matters.

*#91, supra*, 235 P.3d at 1077. The general linkage of the two – program plus restriction on lawmaking – is not enough to save a measure from a single subject challenge. “[W]hen provisions seeking to accomplish one purpose are coupled with provisions proposing a change in governmental powers that bear no necessary or proper connection to the central purpose of the initiative, the initiative violates the single-subject rule.” *Id.*

Measures such as #293 that layer an inhibition on policy-making into a tangentially related substantive change present exactly the concerns that gave rise to the single subject requirement. As this Court found in *#91*, voters would be forced into choosing between an attractive program they might be inclined to support and then also forsaking legislative prerogatives that could be used in pursuit of other policy goals. “An elector going to the polls in the upcoming general election might

favor a beverage container tax while being opposed to depriving the General Assembly of its legislative authority over the basin roundtables and the interbasin compact committee or vice versa.” *Id.* at 1079. Thus, voters would have to vote “yes” or “no” by sacrificing one policy goal for another.

Here, voters might well value enhanced preschool programming. Yet, they would also have to agree to giving up a valued source of state revenue if their jurisdiction banned tobacco or nicotine products “in any form” for public health reasons. The dilemma is apparent – choosing between preschool today as opposed to public health (and consistent local government budgets) tomorrow. That forced choice is contrary to the purpose of the single subject requirement.

Local government bans of certain forms of such products are far from theoretical. For example, Denver already bans tobacco products sales “in any form” other than the manufacturer’s packaging. *See* Denver Revised Municipal Code (“D.R.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”). It also bans tobacco sales to minors or by vending machines and electronic products that produce “a vapor of nicotine.” *See, e.g.*, D.R.M.C. §24-402, -403; 38-9(a)(1), (b). If the policy makers of Fort Collins or La Junta or Telluride

seek to impose such bans, they could only do so if they were willing to give up state cigarette taxes in return. This forced trade-off is hidden from voters.

The single subject requirement was also adopted to prevent the post-election question, “What do you mean that initiative I voted for tied my hands in ways I didn’t know about at the time?” This is the oft-quoted single subject objective of “prevent[ing] voter surprise by prohibiting proponents from hiding effects in the body of a complex proposal.” *Id.*; accord, *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (#55”); *see* C.R.S. §1-40-106.5(1)(e)((II) (single subject requirement intended to “prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters”). That concern is a top priority to the Court where “[v]oters [are] confronted with [a] lengthy ballot initiative championing” one policy objective that, hidden in the corner of the measure’s text, also “would deprive the legislators they elect from exercising any authority” over governmental decision making in a vaguely related arena. #91, *supra*, 235 P.3d at 1079.

As noted above, this is precisely what #293 does. The financial penalties to local governments, associated with public health bans on tobacco or nicotine products, would never be apparent to voters who think they are voting on preschool

programs funded by existing revenue sources. Voters likely would be stunned to learn that they voted to improve their children's lives in one way (increased preschool options) but lost the ability to keep them safe in an equally important way (prohibiting certain forms of tobacco and nicotine products in their town). Proponents cannot pair these objectives in the same measure when the latter "hamstring[s] the elected constitutional body designed under Colorado's republican form of government" that is empowered to make such policy decisions. *Id.*

#91 was not an isolated decision. This Court has disapproved on single subject grounds a measure that addressed procedural aspects of initiative and referendum petitions but also excluded the use of any referendum as to zoning matters that reduced private property rights. "[P]rohibiting referendum petitions that reduce private property rights constitutes a third subject unrelated to these initiatives' central focus of liberalizing the process by which initiatives and referendums are placed on the ballot. The inclusion of this provision therefore violates article V, section 1(5.5) [of the Colorado Constitution]." *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives #43 and #45*, 46 P.3d 438, 448 (Colo. 2002) ("#43 and #45").

The proponents in that matter, other than using the general rubric of petition procedures, could not justify this seemingly arcane but, in fact, significant change to



the policy making right of legislators (there, voters). This tangentially related restriction on voters impeded access to their fundamental constitutional right to legislate via the ballot box and violated the single subject requirement.

As to #293, voters could not petition a measure onto a local ballot to ban “any form” of tobacco or nicotine product without jeopardizing certain line items in their town’s budget. The relative desirability of local bans on these products and preserving local legislators’ prerogative to enact them is unrelated to the supposed single subject of #293 – providing preschool programs out of existing state revenues. *See #55, supra*, 138 P.3d at 282 (single subject requirement guards against voters who might “have unwittingly voted” based on a headline purpose of an initiative without being aware of its additional subjects). Therefore, #293 violates the single subject requirement and should be returned to Proponents.

C. The titles are misleading and must be corrected before being presented to potential petition signers and voters.

*1. The titles are silent about the penalty created for local jurisdictions that ban the sale of any tobacco or nicotine product.*

If the Court does not find that the aspect of #293 described above comprises a second subject, it should find that the Board erred by refusing to allude to it in the titles.

As described above, voters need to know that their town will have to decide between receiving state cigarette tax revenue and retaining the ability to ban sales of one or more tobacco and nicotine products. Given that a ban of such products “in any form” triggers the penalty provision of #293, the array of legislative actions that could force a forfeiture of tax revenues is broad. But it was drawn broadly, and thus the intent of the Proponents clearly was to require voters to choose among competing priorities.

The fiscal abstract prepared for #293 shows how substantial this penalty will be to affected jurisdictions. “The measure reduces funding for local governments which have enacted a ban on tobacco and nicotine products as of December 31, 2021. This revenue loss is estimated at up to \$4.4 million in FY 2021-22 and up to \$8.8 million in FY 2022-23.” Abstract of Initiative #293 at 6.<sup>3</sup> Voters should know, in signing petitions and in voting, that their town may give up a portion of this total.

“The title and submission clause should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Title, Ballot Title*

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<sup>3</sup> The abstract can be found in the materials certified by the Title Board for this appeal or at:

<https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/293FiscalImpact.pdf>

*& Submission Clause 2013-2014 #90*, 2014 CO 63, ¶23, 328 P.3d 155, 162. This loss of financial support (or the retention of that revenue in return for giving up flexibility in public health policy-making) is certainly an aspect that would affect the voters' ability to "determine intelligently" how to assess this measure. The measure consists of constitutional amendments and statutory changes, set out at length over more than five single-spaced pages. There will be voters "unfamiliar with the subject matter" of this proposal, and they should at least be informed that the measure requires local jurisdictions to engage in policy trade-offs. The Board's refusal to acknowledge this fact – a material omission from the title – warrants reversal of its decision concerning the titles' language.

2. *The titles fail to inform voters about major cuts to programs from existing funds.*

#293 identifies specific programs that must forego funding from the tobacco litigation settlement moneys. Section 2 of the measure identifies eleven (11) different programs that will lose revenue, ranging from programs that receive 26.7% of those moneys to those that lose 1% of that fund. Yet, the programs that will lose funds are only described in the titles as moneys now being used for "certain health-related programs and other state purposes."

The phrase the Board used here tells the voters almost nothing. It doesn't say that specific programs are losing their funds. It doesn't tell them which programs

stand to be underfunded and thus will need to limit providing services. It doesn't even indicate the major changes as a function of the percentages #293 strikes from current law.

To be clear, several programs stand to lose the greatest share of the tobacco settlement moneys.

- The Colorado nurse home visitor program created in Article 6.4 of Title 26, C.R.S. will lose its current allotment of 26.7% of the settlement moneys.
- The University of Colorado Health Sciences Center will lose 15.5% of the settlement moneys.
- The Fitzsimons Trust Fund created in C.R.S. 23-20-136(3) will lose 8% of the settlement moneys.
- The Tony Grampsas Youth Services Program created in Article 6.8 of Title 26, C.R.S. will lose 7.5% of the settlement moneys.

In *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶¶32, 369 P.3d 565, 570, the Court reversed the Title Board because the title set used such overarching generalities about procedural changes that it did “not provide sufficient information to allow voters to determine intelligently whether to support or oppose the proposal.” The key details omitted from the titles included the percentage drop in signatures required to begin a recall election, the lower number

of signatures required for certain recall elections, and the change in process to determine validity of recall petitions. *Id.* at ¶¶29-31. Only by listing these details would the title “satisfy the clear title requirement.” *Id.* at ¶32 (citing C.R.S. 1-40-106(3)(b)).

It would have been appropriate and consistent with Title Board practice to provide voters with at least the names of several of the key programs affected. As just one example, when the Board set a title for Initiative 2019-2020 #250, it found it necessary to describe a so-called “learning opportunities” program by describing the specific types of uses for the tax revenue at issue. The titles stated these moneys 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.”<sup>4</sup> This is a non-exclusive list from the initiative itself, but as a list of six (6) areas that could be funded, it was deemed necessary for voter understanding. On May 1, 2020, this Court affirmed the Board’s decision.

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<sup>4</sup> <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2019-2020/250Results.html>

In the same way, the Board here should have listed the key programs that stand to lose from the “reallocation” of existing tax revenues. That information is needed so voters can judge this proposal, based on its title, for what it actually does.

The Board should reset this title to meet this need.

### **CONCLUSION**

The Board’s decisions in considering and setting titles for #293 should be reversed.

Respectfully submitted this 6<sup>th</sup> day of May, 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 **PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #293 (“TOBACCO TAX REVENUE FOR NEW STATE PRESCHOOL PROGRAM”)** was sent electronically via CCEF this day, May 6, 2020, to the following:

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