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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #315 ("Tobacco Tax Revenue for New State Preschool Program") **Petitioner: Anna Jo Haynes** **v.** **Respondents: Monica Vondruska and Jon Caldara** **and** **Title Board: Theresa Conley, David Powell, and Julie Pelegrin**	▲ COURT USE ONLY ▲
Attorney for Petitioner: Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com	**Case No. 2020SA000154**

PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #315 ("TOBACCO TAX REVENUE FOR NEW STATE PRESCHOOL PROGRAM")

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).

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s/ Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

This measure largely mimics Initiative #293, on appeal to this Court. The issue of the misleading single subject wording is unique to #315 and requires reversal of the Title Board.

LEGAL ARGUMENT

A. Initiative #315 violates the constitutional single subject requirement.

The Board and Proponents disagree about how #315's financial penalty for local bans of "tobacco and nicotine products in any form" can be deemed part of a single subject. For the Board, this attempt to skew local policy-making is merely an implementation provision or a statement of #315's effect on a state law. The Proponents insist this financial penalty is an important funding source for the preschool program and thus is an integral element of their measure.

The Board is wrong; it cannot be that the financial penalty resulting from local bans of tobacco and nicotine products is an irrelevancy. This Court does not treat limits on legislative power as an incidental byproduct of an overly ambitious citizen initiative. When an element of a ballot measure represents a "significant invasion" of an already existing constitutional right (such as local law-making authority concerning zoning), that element is incongruous as it does not "relate **directly** to the proposed initiative's single subject." *In the Matter of the Title, Ballot Title and*

Submission Clause for 2009-2010 # 91, 235 P.3d 1071, 1079-80 (Colo. 2010) (citations omitted) (emphasis added).

The Proponents are also wrong. They misstate their measure, arguing their financial penalty provision applies only "if a local government enacts a ban on tobacco and nicotine products (**and as a result does not collect cigarette tax revenues**)." Proponents' Opening Brief at 9 (emphasis added). Thus, they depend on the assertion that there is a nexus between taxes withheld (state cigarette taxes) and tax revenues foregone (due to bans on "tobacco and nicotine products in any form").

Proponents placed #315's financial penalty on local jurisdictions in C.R.S. § 39-22-623(1)(a)(II)(A). By its express terms, that provision deals only with the "gross state cigarette tax." *Id.*

In contrast, the financial penalty created in #315 applies if there is any ban on any "tobacco or nicotine products in any form." Proposed Section 39-22-623(1)(a)(II)(A). The statutory definition of "tobacco product" is broad and almost unwieldy. *See* C.R.S. § 39-28.5-101(5).

The Court has recently interpreted this provision and its inclusive reference to "other kinds and forms of tobacco." Reversing the Court of Appeals, this Court noted that "this catchall category is **particularly expansive**." *Colo. Dept. of*

Revenue v. Creager Mercantile Co., 2017 CO 41M, ¶20, 395 P.3d 741, 744 (emphasis added). In fact, that catchall "does not limit the type or character of the product, so long as it is tobacco." *Id.*

Thus, a local ban on snuff or cigars (not to mention cheroots, plug cut, snuff flour, or cavendish – all non-cigarettes, as a matter of law, C.R.S. § 39-28.5-101(5)) – will result in a financial penalty to localities that would otherwise receive state revenue from taxes on an entirely separate product, cigarettes. A city could allow cigarette sales but prevent sales of other nicotine or tobacco products, and it would lose its share of state cigarette taxes. Thus, Proponents misstate existing law and their proposal as a basis for their conclusion that #315 contains a single subject.

Voters should not be forced to choose between banning non-cigarette tobacco or nicotine products, such as Blunt Wraps that are suitable for smoking "marijuana[] and other smoking material," *Creager, supra*, 2017 CO 41M, ¶21, and keeping their locality's share of state cigarette taxes. This is a hidden future dilemma for local policy-makers that is concealed within a multidimensional proposal that seems to address only the more politically palatable topic of preschool access. Thus, #315 is exactly the type of measure that gave rise to the single subject requirement.

B. The Board failed to set a clear title for Initiative #315 by stating this measure creates a constitutional tax.

1. There is no disagreement: the title for #315 is substantively inaccurate.

The advocates of this title do not dispute two key facts:

(1) the title tells voters that #315 raises taxes because of ("by") an amendment to the Constitution; and

(2) #315 doesn't actually increase taxes by constitutional amendment but instead increases taxes solely by amending the Colorado Revised Statutes.[1]

As such, the Title Board and Proponents ask this Court to approve a ballot title they know is inaccurate and misleading to voters about what exactly what kind of amendment the new tax is – constitutional or statutory. *See* Resp. Op. Br. at 13-15; Title Board Op. Br. at 13-14

The standard that applies to the Title Board's misstatements is fairly simple. Where the Board's wording is wrong based on the text of an initiative and voters will be misled, the Board has erred.

For example, in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to the Proposed Initiative Under the Designation "Tax*

[1] Respondents explicitly make this admission, stating "Initiative #315 **establishes a new statutory tax** on tobacco-derived nicotine vaping products." Resp. Op. Br. at 3, n. 3 (emphasis added).

Reform," 797 P.2d 1283 (Colo. 1990) ("*Tax Reform*"), the Board set titles, a summary, and a fiscal impact statement about a tax measure. *Id.* at 1289. The summary[2] in that case incorrectly stated that "[f]ood shall not be included in the tax base without approval of the registered electors." *Id.* That statement was wrong because "for the residents of numerous jurisdictions…, food will continue to be taxed and will be included in the local sales tax base." *Id*. at 1289.

This substantive misstatement of the initiative was "untrue." *Id.* at 1290. Because it was false, it did not "correctly" reflect the initiative to be voted on and was "misleading." *Id*. at 1289. As such, the Board's decision warranted reversal.

In *Tax Reform,* the summary also misrepresented whether services could be taxed. The summary stated that services could not be taxed without a two-thirds vote of both houses of the General Assembly. In fact, quite a few services were then subject to tax, and those taxes were grandfathered by the initiative. The proponents argued that this misstatement should be overlooked "because of the need for brevity," but the Court rejected that rationale: "here brevity has been taken to the

[2] Until the initiative statute was amended, C.R.S. § 1-40-101(2) required the Board to formulate a summary of an initiative, a somewhat more expansive description of what an initiative sought to achieve. *Tax Reform, supra*, 797 P.2d at 1288. The adequacy of the summary was judged by the same standards as the adequacy of the ballot title. *Id*. at 1288-89.

extreme." *Id.* at 1290. The substantive misstatement about the tax was "untrue and misleading and likely to create prejudice among the voters." *Id.*

The Court treats a ballot title in the same manner. As noted in the Objector's Opening Brief, the Court has invalidated titles for misstating the law that would be changed. In one instance, a ballot title overstated the legal status of affected mining permits (current vs. future), and another ballot title incorrectly stated the classes of judges affected by a new set of legal standards. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215*, 3 P.3d 11, 16 (Colo. 2000); *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #245(b)-(e)*, 1 P.3d 720, 723 (Colo. 2000). Representations in both titles were untrue, inaccurate, and misleading, and that was – and is – enough to overturn a Board decision.

The Title Proponents in this case question whether a title's misstatement of the body of law to be amended is worth correcting, suggesting that this is not relevant to voters and is thus not a central feature of #315. Resp. Op. Br. at 13-15; Title Board Op. Br. at 13-14. Neither party cites any specific legal authority that holds that the body of law being amended is beyond voters' understanding or any case law that addresses, much less holds, that the body of law to be amended is not a central feature of the measure.

The General Assembly, however, has clearly addressed this issue of whether people should know, as here, whether a new tax is constitutional or statutory in nature. In fact, both parties use the statute highlighting the difference between constitutional amendments and statutory changes as support for their arguments, albeit with different conclusions. *See* C.R.S. § 1-40-106(3)(c) ("In order to avoid confusion between a proposition and an amendment, as such terms are used in section 1-5-407 (5)(b), the title board shall describe a proposition in a ballot title as a 'change to the Colorado Revised Statutes' and an amendment as an 'amendment to the Colorado constitution'.").

Respondents argue that the Board's compliance with C.R.S. § 1-40-106(3)(c) was the reason it misstated the proposed initiative. Resp. Op. Br. at 14. But as the statute's plain language reveals, nothing in the law requires that the title set for an initiative amending both the constitution and the statutes first refer to the constitution. That provision of the statute does not address how ballot titles are to be worded at all, except that constitutional amendments are referred to as such, and statutory changes are referred to as just that – changes to state statute.

In fact, the legislature's distinction between constitutional "amendments" and statutory "changes" highlights the importance placed on voter understanding about the bodies of law to be changed. The General Assembly clearly sought to amplify

the difference between the bodies of law being amended, not obscure it, so voters would know the impact of a "YES/FOR" vote or a "NO/AGAINST" vote.

This distinction is so important that the legislature amended the initiative statute in three different places to address it. First, the Title Board is specifically directed to draw a clear line. "[T]he title board shall describe a proposition in a ballot title as a 'change to the Colorado Revised Statutes' and an amendment as an 'amendment to the Colorado constitution'." C.R.S. § 1-40-106(3)(c).

Second, written ballots must be printed with language that differentiates between constitutional amendments and statutory changes. In fact, all ballots must explain this distinction to voters – not once, but twice.

> Each ballot shall have the following explanation printed one time at the beginning of such ballot measures:… A ballot question listed as an 'amendment' proposes a change to the Colorado constitution, and a ballot question listed as a 'proposition' proposes a change to the Colorado Revised Statutes…. For each ballot title that is an amendment, the amendment number or letter shall be immediately followed by the description "(CONSTITUTIONAL)". For each ballot title that is a proposition, the proposition number or letters shall be immediately followed by the description "(STATUTORY)".

C.R.S. § 1-40-115(2)(a).

Third, audio ballots used for visually impaired voters must convey this same distinction. For "a ballot title that is an amendment…, the audio ballot shall include the following: 'The following ballot question proposes a change to the Colorado

constitution.'" C.R.S. § 1-40-115(2)(b)(I). For "a ballot title that is a proposition…, the audio ballot shall include the following: 'The following ballot question proposes a change to the Colorado Revised Statutes.'". C.R.S. § 1-40-115(2)(b)(II).

As if these three statutory provision were not enough, the General Assembly specifically expressed the policy it was trying to achieve – that voters comprehend the law they are asked to approve. House Bill 12-1089's legislative declaration echoed Article V, section 1(5.5) of the Colorado Constitution, stating that an initiative's single subject "must be clearly expressed in its title." 2012 Sess. Laws Ch. 241, 241. In addition, the legislature stated that a distinction between constitutional "amendments" and statutory "propositions" was necessary "in order to avoid confusion between" the two types of legal changes. *Id.* at 242 (C.R.S. § 1-40-106(3)(c)).

The mandate to the Board is, in the first instance, to be accurate. Where the question is whether the Board erred in stating what voters are about to approve or disapprove, the title either is correct in what it relates or it's not. Here, there is no dispute that it was wrong. And that error will mislead voters into thinking they are placing a tax in the Constitution. The Board must reset this title before it can be presented to voters whose signatures on petitions and votes in November will decide the fate of this proposed statutory tax.

2. The Board abused its title setting discretion which is not unlimited.

The Title Proponents argue that the Board acted within the discretion allocated to it in misstating the law amended to impose #315's new tax. Resp. Op. Br. at 15; Title Board Op. Br. at 14, 15. But neither recognizes the basic tenet of any exercise of discretion: the Board has discretion but only where there is, as a factual matter, a basis for the Board's decision in the record below.

The Title Proponents have slightly different takes on this discretion. The authors of #315 ("Proponents") maintain that, as to the statement about the tax being constitutional, the Title Board "acted well within its broad discretion in ensuring the titles comport with Colorado law." Resp. Op. Br. at 15. This statement fails for two reasons.

First, the Board's discretion is broad but not boundless. "The Board's exercise of discretion… is not unlimited and must have some support in the record." *In the Matter of the Title, Ballot Title and Submission Clause Adopted February 10, 1992*, 831 P.2d 1301, 1306 (Colo. 1992); *see #91, supra*, at 1088 (Coats, J., dissenting) (Board's actions subject to "judicial review for an abuse of discretion").

As to this title, there is no support in the record for the misstatement that "state taxes are increased… by an amendment to the Colorado Constitution." The pertinent

portion of the record is the initiative text, and this title is indisputably false when held up to the text.

Second, the Proponents argue that the Board had to meet the demands of the statute that requires the distinction of constitutional amendments and statutory changes. "Thus, after the TABOR language, the Title Board was required to provide both the constitutional and statutory amendment language provided in section 1-40-106(3)(c), C.R.S." Resp. Op. Br. at 14-15.

As noted above, the law cited only requires a title to refer to a proposed constitutional amendment as an "amendment to the Colorado Constitution" and a proposed statutory change as a "change to the Colorado revised statutes." C.R.S. 1-40-106(3)(c). This statute does not address the order in which topics are addressed or deal with how to phrase the single subject phrase in an initiative's ballot title. The Board can be clear about the law being amended by using the labels ("amendment" and "change") without confusing voters about the body of law where the new laws are to be placed.

The Title Board excuses its misstatement because the body of law to be amended is just one of the "details" of an initiative. "In exercising its drafting discretion, the Board was not required to specify in detail that the new sales tax

resides in statute rather than in the Colorado Constitution." Title Board's Opening Brief at 5. Thus, the Board exercised its discretion in misstating this feature of #315.

But the Board's error wasn't that the title addressed the major elements of the measure correctly and ignored some implementation provisions. The Board's error was that the title was untrue; there is simply no argument that the tax is created, in whole or in part, "by an amendment to the Colorado constitution." Thus, there is and could be no support in the record for this statement, and the Board cannot cloak itself in its innate discretion to excuse this glaring error.

Because the title made a key statement that is untrue, voters will be misled.

3. *The Board also abused its discretion when it allowed one of the Proponents to decide if the title should state that #315 creates a constitutional tax.*

The Board and the Respondents' counsel did come to acknowledge that the statutory nature of this tax could be added to the title to provide additional clarity. The proposed change did not alter the single subject statement, but it would have provided additional information to voters.

According to Board Member Jason Gelender, "If we wanted to add 'statutory' right after 'new' (and before "tax") on line 6, I'd probably be willing to do that." April 23, 2020 Title Board Meeting Recording at 2:37:25-40 (middle portion of title would have read, "imposing a new ***statutory*** tax on tobacco-derived nicotine vapor

products").[3] The Proponents' counsel did not object to this clarification. "I would be fine with adding 'statutory' there, just to address that issue and any potential appeal on it." *Id*. at 2:38:45-39:05 (statement of Ben Larson). The undersigned did not advocate for this language as it did not cure the incorrect single subject statement, but he did not argue against it either. *Id.* at 2:40:59-41:25.

However, one of the Proponents – despite his lawyer's earlier statement to the contrary – actively argued that this clarification be omitted. About the reference to "statutory" as a modifier of "tax," Proponent Caldara said that "statutory" is "just something that confuses." He felt voters only need to know, "Is it a tax is it not a tax? What am I voting for or against?". For this reason, "'statutory' just really doesn't matter for me. It's just more words. And more words are confusing so I'd rather keep it out." *Id.* at 2:39:15-35.

Board Member Conley disagreed that "statutory" would be confusing to voters. "I think people would generally know the difference between a statutory tax and a constitutional one so it feels a little more descriptive to me…." *Id*. at 2:40:35-48. Because voters are presumed to know the existing law being amended, she was correct. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000).

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[3] https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=172

After some additional discussion, the Board was of two minds but effectively gave the deciding vote to Proponent Caldara. At one point, Board Member Gelender stated about adding "statutory" to clarify this issue, "As you two might say, I can live with it or without it."

The Proponents' counsel then volunteered, "Well, then, I say we go with Mr. Caldara." And Mr. Gelender responded, "Works for me." The only other conversation on the issue was from Board Member Powell who told staff who had put "statutory" in the draft title projected in the videoconference, "He wants to take out 'statutory.'" *Id.* at 2:46:07-08. And so the Board went along with Mr. Caldara's preference, omitting the clarifying word.

In deferring to Proponents' wording preference as the Board's tie-breaker ("Well, then, I say we go with Mr. Caldara"), the Board brought none of its own skills or experience to the decision. "Works for me" is a concession, not a decision. And when the Board cannot sort out a legal quandary presented by an initiative, it errs by simply giving the Proponents the deciding vote.

"[T]he General Assembly has squarely placed the responsibility for carrying out the dual mandate of Article V, section 1(5.5) on the Title Board." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). That set of duties imposed on the Title Board

includes determining whether a measure comprises a single subject and how to set titles that will not confuse voters about the measure. *Id.* These duties belong to and must be fulfilled by the Board, which cannot give that job over to proponents.

> [T]he Board believed its duty to assist potential proponents in implementing their right to initiate laws included resolving all ambiguities in favor of the proponents herein. **While the Board must give deference to a proponent's expression of his or her initiative's intent, it may not do so at the expense of its other equally important duties.** The Board must simultaneously **consider the potential public confusion** that might result from misleading titles and exercise its authority in order to **protect against such confusion**.

Id. at 469 (citations omitted) (emphasis added).

In other words, the Board can defer to Proponents when the issue is what they intended when they drafted their measure, but the Board cannot simply defer to them when they opt for a confusing ballot title rather than a clear one. Unfortunately, here, the Board members withdrew and allowed the Proponents to resolve a disputed wording choice rather than make their own decision.

"[T]he Title Board must not neglect its duty to consider and address public confusion that might result from misleading titles." *In the Matter of the Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 5, (Colo. 2000). By giving over its discretionary decision to Proponents, the Board did neglect its duty and therefore abused its discretion in setting this title.

4. The Board also abused its discretion in interpreting TABOR to require that they set an inaccurate ballot title.

According to the Proponents, "after the required TABOR language, the Title Board was required to provide both the constitutional and statutory amendment language provided in section 1-40-106(3)(c), C.R.S." Resp. Op. Br. at 14-15. But to the extent that the Board depended on this position, it was incorrect.

First, C.R.S. § 1-40-106(3)(c) does not "require" that the terms "constitutional" or "statutory" follow immediately after the TABOR ballot title language, "Shall (district) taxes be increased (first… full fiscal year dollar increase) annually…." Colo. Const., art. X, sec. 20(3)(c). The statute is silent on the issue altogether. Thus, the statutory provision did not mandate the placement of the phrase, "by an amendment to the Colorado constitution."

Second, TABOR was adopted in 1992. The single subject requirement was adopted in 1994. The 1994 voter-approved amendment established as a matter of constitutional law that the subject be "clearly expressed." "No measure shall be proposed by petition containing more than one subject, which shall be **clearly expressed** in its title…." Colo. Const., art V, § 1(5.5) (emphasis added). To the extent there is any conflict between TABOR and the single subject requirement for a clear title, "it is the latest expression of the people" that must control. *People ex*

rel. Attorney General v. Cassiday, 117 P. 357, 363 (Colo. 1911). Thus, it is this later-approved mandate for a clearly expressed title that the Board must effectuate.

Third, the Board had multiple options. It could have used, albeit in the middle of the title, a single word ("statutory") to provide at least some direction to voters. As the Board chairperson pointed out, this addition would have been meaningful to voters as voters "generally know the difference between a statutory tax and a constitutional one." April 23, 2020 Title Board Meeting Recording at 2:40:35-48.

The Board could also have crafted a more accurate single subject statement. One such construct would be to begin the title with, "Shall state taxes be increased $6,300,000 annually by a change to the Colorado Revised Statutes and shall there be an amendment to the Colorado Constitution and a change to the Colorado Revised Statutes concerning a new preschool program…." Objector's Op. Br. at 20.

This Court has approved ballot titles that ask related questions as being consistent with the fundamental single subject standard, namely, that topics are "so connected with or dependent upon the general subject that it might not be desirable that one be adopted without the other." *Bickel v. City of Boulder*, 885 P.2d 214 (Colo. 1994) (citations omitted). As a result, the Court set the standard that allowed for multi-pronged questions, such as the one set forth above, to be posed to voters.

> Where the ballot title involves both a proposed debt increase and a proposed tax increase with which to repay that debt, the ballot title must include the language set forth in section 3(c) as to both the debt and the tax increases. Thus**, if the district chooses to begin that ballot title with the question "SHALL DISTRICT DEBT BE INCREASED** IN THE PRINCIPAL AMOUNT OF X, WITH A REPAYMENT COST OF Y . . .?" **it must also include in the ballot title the language "SHALL DISTRICT TAXES BY INCREASED BY Z DOLLARS ANNUALLY . . . ?".**

Bickel, supra, 885 P.2d at 231 (emphasis added).

This construct is not just applicable to tax and debt questions. Where the primary purpose of a ballot initiative was to grant a utility franchise and also authorize a contingent tax, the Court upheld a ballot question that asked, "Shall the city of Boulder grant a franchise to Public Service Company of Colorado… and in connection therewith,… shall city taxes be increased by up to eight million dollars….”? *Id.* at 222, 234-235

Here, the Board had multiple options to cure its errors. It did not pursue any of them, leaving voters with a title that will make them believe they are inscribing a tax on vaping in the Constitution. Where voters will be misled because the Board materially departed from the actual initiative text to set a title, the Board must be reversed.

C. The Board failed to set a clear title for Initiative #315 by failing to refer to its financial penalty on localities that ban tobacco or nicotine products in any form and the funding cuts it makes.

The Title Proponents make two basic arguments as to why the title did not reference the threat to fiscal solvency that is triggered for localities that act to ban any tobacco or nicotine products, discussed above, and the funding cuts that are hidden from voters until far too late in the process. First, they argue that these are mere details rather than the measure's central features and, in the name of brevity, were properly excluded from the title. Second, they argue that voters can spend some time with the so-called Blue Book to figure out what programs are affected before they vote. Resp. Op. Br. at 16, 19; Title Board Op. Br. at 16.

1. A brief, non-descriptive title is not a legally sufficient clear title.

It is true that titles are to be brief. C.R.S. § 1-40-102(10) ("'Title' means a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative").

But Title Proponents ignore two cornerstones of title setting. First, the title should inform voters, regardless of how knowledgeable they are, about the key aspects of a measure so that they can decide whether to support it or oppose it.

> It is well established that the Board must act with utmost dedication to the goal of producing documents which will **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 Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238, 242 (Colo. 1990) (internal quotation marks and citations omitted) (emphasis added).

Second, although brevity is a laudable objective for ballot titles, it is not to be achieved at the expense of voter understanding or, as the Court puts it, "full disclosure."

> However**, if a choice must be made between brevity and a fair description of essential features of a proposal, the decision must be made in favor of full disclosure** to the registered electors. In the case of a complex measure embracing many different topics like the proposal now before us, the titles and summary cannot be abbreviated by omitting references to the measure's salient features.

In the Matter of the Title, Ballot Title & Submission Clause, and Summary for Proposed Election Reform Amendment, 852 P.2d 28, 32 (Colo. 1993) (emphasis added).

Here, Objectors have outlined why voters need to know about the penalty on communities that ban "any form" of tobacco or nicotine product. As stated in the fiscal impact statement prepared for #315's petition abstract, it could be substantial.

> Local governments that are otherwise eligible for income tax redistribution based on cigarette tax revenue and that have enacted bans on tobacco and nicotine products as of December 31, 2021, will experience a reduction in revenue. As the total revenue redistributed in

> this way is $8.8 million annually, the amount of revenue diverted from local governments to the Preschool Cash Fund in this way is up to $8.8 million.

R. at 30. Thus, the fiscal assumption was that the entire local allocation – all $8.8 million – could be blocked because localities would have something that would amount to a ban of one of these products "in any form." This belies Proponents' contention that Objectors' concern was "specious" as represented to the Title Board. Proponents' Opening Brief at 17.

Rarely can one quantify a provision of a ballot measure to determine if it is a "central feature." But here, 100% of the local share was used to determine what #315's fiscal ramifications can be. And in an era of diminishing budgets, that $8.8 million is a significant sum.

As to the concerns about brevity where funding cuts are at issue, it is notable that other ballot titles dealing with cigarette and tobacco products were explicit about changes in funding state and local programs and therefore found to be sufficient. #315's ballot title is only 95 words. In contrast, Amendment 72's ballot title dealing with cigarette and tobacco products taxes was 121 words,[4] and described the

[4] Legislative Council of the Colorado General Assembly, *2016 State Ballot Information Booklet*, Research Publication No. 669-6 at 39 (http://leg.colorado.gov/sites/default/files/2016_bilingual_bluebook_for_the_internet_0.pdf)

programs to be funded in 66 words.[5] Amendment 35's ballot title addressing the same basic subject was 296 words[6] and described the programs to be funded in 79 words.

The point is, the concerns voiced here about brevity ignore the reality of what Colorado voters expect and need to know in terms of what happens when funding formulas change. At bare minimum, voters should know where new money will be directed and where existing funding will be cut. The Title Board failed to meet these reasonable informational requirements for the voters who use this information.

2. As a matter of law, petitions are not required to include the initiative text so petition signers can know of these central features of #315.

Title Proponents argue that, even if the information is relevant to voters, they can read the Blue Book to gain an understanding before they vote. Respondents' Opening Brief at 5, 16, 19; Title Board Opening Brief at 16. Title Proponents are wrong that this is an adequate substitute for a sufficient title, particularly this year.

As the Court has long held, the title is not just for voters at the end of an election cycle; as a matter of process, a title is first a priority for members of the

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[6] Legislative Council of the Colorado General Assembly, *Analysis of the 2004 Ballot Proposals*, Research Publication No. 527-8 at 28 (http://hermes.cde.state.co.us/drupal/islandora/object/co:2995/datastream/OBJ/view).

electorate who are asked to be petition signers, something that could take place within days or weeks if the Court rejects this appeal.

> Though included in the summary, the abortion definition is absent from the title and the ballot title and submission clause prepared by the Board. Without this definition, these two documents do not **fully inform the signors of the initiative petition** and the persons voting on the initiative; and, consequently, do not fairly reflect the contents of the proposed initiative.

Abortions for Minors, supra, 794 P.2d 238, 242 (emphasis added).

Of course, there is no Blue Book for petition signers. However, there are information sources that are typically available in the petitioning process. Colorado law mandates that a document only qualifies as a petition "section" if it contains the initiative text, for instance.

> "Section" means a bound compilation of **initiative forms** approved by the secretary of state, which **shall include pages that contain** the warning required by section 1-40-110 (1), the ballot title, the abstract required by section 1-40-110 (3), and **a copy of the proposed measure**; succeeding pages that contain the warning, the ballot title, and ruled lines numbered consecutively for registered electors' signatures; and a final page that contains the affidavit required by section 1-40-111 (2). Each section shall be consecutively prenumbered by the petitioner prior to circulation.

C.R.S. § 1-40-102(6). As the Title Board points out, the alternative to a Blue Book explanation of an initiative can be "the language of the measure itself." Title Board Opening Brief at 16.

Earlier this month, that changed. Governor Polis issued Executive Order D 2020 65[7] and ordered the temporary suspension of multiple statutes that related to petitioning for initiatives, including the one quoted at length above, C.R.S. § 1-40-102(6). (See Attachment 1, hereto.)

In relevant part, this order states: "I temporarily **suspend the requirements** in C.R.S. §§ **1-40-102(6)**, 1-40-110, 1-40-105.5(4), and 1-40-113 **that govern** the form of a ballot issue, how a ballot issue petition must be compiled, and **the specific information that must be printed on the ballot issue petition**." Executive Order D 2020 65 of Gov. Jared Polis at 2 (¶II.A) (emphasis added). In other words, at this moment in time, there is no requirement that these Proponents comply with any of the legal requirements that provide information to potential petition signers.

The Governor directed the Secretary of State to adopt rules that would allow for emailed petitions or mail-in petitions, among other options. *Id.* at 3 (¶G.a). Those rules could also require that "the full text of the ballot issue must accompany the petition for signature." *Id.* at ¶G.b. Of course, any such rule is a matter of conjecture at this point. The only certainty is that the statute that mandates the inclusion of the initiative text in a petition form has been suspended.

[7] https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20065%20Ballot%20Issue%20Signatures.pdf

Without the initiative text, voters could sign this petition and very possibly have no idea what they are signing onto. As it relates to this appeal, they wouldn't know about the programs to be cut or the measure's hidden restriction on local policy-making.

Regardless of whether the Secretary of State adopts regulations to mimic the now-suspended initiative statutes, the ballot title serves its statutorily assigned function only if, as this Court has previously noted, the title provides "full disclosure" to voters. *Proposed Election Reform Amendment, supra*, 852 P.2d at 32. This title does not achieve that goal.

CONCLUSION

The Title Board's decisions should be reversed.

Respectfully submitted this 29th day of May, 2020.

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #315 ("TOBACCO TAX REVENUE FOR NEW STATE PRESCHOOL PROGRAM")** was sent electronically via CCEF this day, May 29, 2020, to the following:

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