SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 15, 2020 3:40 PM
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. 2020SA154**

PETITIONER'S OPENING 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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X It contains 6,301 words.

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X 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
Mark G. Grueskin
Attorney for Petitioner

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ISSUES PRESENTED

1. Whether the Title Board's single subject decision was legal error, given that Initiative 2019-2020 #315 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 set for Initiative #315 mislead voters in stating that new tax revenue will be generated "by an amendment to the Colorado constitution and a change to the Colorado revised statutes" when this new tax is not placed in the Constitution at all and is statutory only.
3. 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.
4. 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 #315 is a companion measure to another proposed ballot measure, Initiative 2019-2020 #293 ("#293") for which the Title Board set titles that are now before this Court, Case No. 2020SA000136. Each of the issues raised in the appeal on #293 are raised here as well, and each warrants reversal of the Title Board's decision on the ballot title set for #315.

Besides largely replicating #293, Initiative #315 also creates a new tax on nicotine vapor products and directs that the revenue be used for preschool programming. Because this measure generates new revenue from a new tax, the question is structured to, and does, comply with the Article X, section 20 of the Colorado Constitution ("TABOR") and thus begins the ballot title with the phrase, "Shall taxes be increased…."

However, the Board's chosen wording misstates the initiative by informing voters that this new tax revenue is generated "by" an amendment to the Colorado Constitution although that is not true. The question reads, in relevant part:

> **SHALL STATE TAXES BE INCREASED $6,300,000 ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION AND A CHANGE TO THE COLORADO REVISED STATUTES** CONCERNING A NEW PRESCHOOL PROGRAM THAT IS FUNDED WITH REVENUE GENERATED

BY STATE TAXES ON TOBACCO AND NICOTINE PRODUCTS, AND IN CONNECTION THEREWITH…."

(Emphasis added.)

The highlighted phrase above can be construed in one of two ways: (1) the new tax is created in the Constitution and the preschool program is created in statute; or (2) the tax and the preschool program are both created in both the Constitution and statute. Both constructions are incorrect as both are based on the representation that the tax is created "by" an amendment to the Colorado Constitution even though it is not created there. Instead, #315 imposes this new tax only in statute. Proposed C.R.S. § 39-28.6-103.

This misstatement violates several legal mandates concerning ballot titles. First, the Colorado Constitution requires that the single subject of an initiative be "clearly expressed" in the ballot title. Additionally, Colorado statute requires that: (1) an initiative be "accurately" summarized by the title; (2) the title reflect the "true… meaning" of the measure; (3) the title "correctly" set forth the substance of the proposal; and (4) the title "unambiguously" state the principle of the initiated legal change.

This Court holds that an out-of-place phrase can render the title misleading, and that precept applies here. The misplaced phrase here expressly states that a new

statutory tax is actually imposed "by the Constitution" when it clearly is not. As noted, it is purely a creature of a proposed statute. This misstatement is material and significant, and the title must be returned to the Board.

STATEMENT OF THE CASE

A. Statement of Facts.

Monica Vondruska and Jon Caldara (the "Proponents") proposed Initiative 2019-2020 #315 ("Initiative #315" or "#315"). The Title Board set the following title and affirmed it after a motion for rehearing was filed.

> SHALL STATE TAXES BE INCREASED $6,300,000 ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION AND A CHANGE TO THE COLORADO REVISED STATUTES CONCERNING A NEW PRESCHOOL PROGRAM THAT IS FUNDED WITH REVENUE GENERATED BY 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 PAYING FOR THE PROGRAM BY: 1) IMPOSING A NEW TAX ON TOBACCO-DERIVED NICOTINE VAPOR PRODUCTS; AND 2) REALLOCATING FROM CERTAIN HEALTH-RELATED PROGRAMS AND OTHER STATE PURPOSES PORTIONS OF THE EXISTING REVENUE FROM TAXES ON TOBACCO AND NICOTINE PRODUCTS AND MONEY THE STATE RECEIVES FROM TOBACCO LITIGATION SETTLEMENTS?

The final text of Initiative #315[1] would amend the Colorado constitution and change the Colorado Revised Statues. The Constitution is amended by redirecting revenue generated by existing state taxes under Section 21 of Article X 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 #315 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 #315 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] The text of #315 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/2019-2020/315Final.pdf

> (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.)

Initiative #315 amends Colorado statute by creating a new tax on nicotine vapor products and directing it to the aforementioned preschool program. However, the Title Board misstated where this tax is created in stating it is created "by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes." In fact, the tax is only a statutory tax. Thus, the Board materially misrepresented this tax to voters.

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 15, 2020, at which time titles were set for #315. On April 22, 2020, Petitioner Anna Jo Haynes filed a Motion for Rehearing, alleging that the Title Board erred in setting a ballot title because #315 violates the single subject requirement of the Colorado Constitution, and that the Title Board erred because the titles set for #315 are incomplete in describing the measure's central features and are otherwise misleading to voters, including by stating that the new tax is created in the Colorado Constitution. Rehearing was held on April 23, 2020, at which time the Title Board denied the Motion for Rehearing.

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 and clear title 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 #315 at II.A.3, B.1, B.3., and B.4.[2]

B. Initiative #315 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

[2] 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/2019-2020/315Rehearing.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 #315 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 #315 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 #315, 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 #315 – 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, #315 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 title's single subject statement is misleading because it erroneously informs voters that the new nicotine vapor tax is set, in whole or in part, "by an amendment to the Colorado Constitution."

(a) A misstatement of the substance of a ballot measure requires reversal of the Title Board's decision.

This Court reviews the Title Board's decision to guarantee that an initiative's title, as summarized in the title, does not misrepresent the substance of that proposal

and, in so doing, mislead voters. The Court must "ensure that the titles… fairly reflect (an initiative) so that voters will not be misled to vote for or against the proposed initiative merely by virtue of the particular words employed by the Title Board." *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215*, 3 P.3d 11, 14 (Colo. 2000). Where "the text of (an initiative) is contrary to the language of the titles," the Board errs, and the title is returned to the Board for correction. *Id.* at 16.

#215 is particularly instructive as the Board summarized an initiative relating to proposed limits on certain mining permits but incorrectly stated in the title that a restriction would apply to all mining permits (current and future) when the measure stated it applied only to currently permitted mines. That substantive error in the titles meant that they were "misleading and inaccurate." *Id.*

Here, #315's title asks, "Shall state taxes be increased $6,300,000 by an amendment to the Constitution and a change to the Colorado Revised Statutes concerning a new preschool program that is funded with revenue generated by state taxes on tobacco and nicotine products." This wording may communicate to voters one of two legal constructs – both of which are wrong.

- Voters could be led to believe the new tax is created in the Constitution ("Shall state taxes be increased $6,300,000 by an amendment to the

Constitution"), and the new preschool program is created in statute ("and a change to the Colorado Revised Statutes concerning a new preschool program that is funded with revenue generated by state taxes on tobacco and nicotine products….").

- Alternatively, voters could believe that the new tax is created in both the Constitution and in statute ("Shall state taxes be increased $6,300,000 by an amendment to the Constitution and a change to the Colorado Revised Statutes…").

Either representation of how this tax is created would be incorrect. This new tax is created in a proposed statute alone. *See* Proposed Section 39-28.6-103. As in *#215*, this substantive misstatement about the legal reach of an initiative will certainly mislead voters.

There can be no question that, in stating that taxes are increased "by" an amendment to the Constitution, the title clearly communicates that the Constitution increases this tax. This Court will use general rules of statutory construction and "accord the language of the proposed . . . titles their plain meaning." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶8, 413 P.3d 151, 153, citing *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 8, 274 P.3d 562, 565.

As used here, "by" has a plain meaning – "through or through the medium of" or "through the agency or instrumentality of." *Merriam-Webster's Collegiate Dictionary* 170 (11th ed. 2003).[3] The Board ignored this plain meaning of "by" and, in so doing, misled voters about a key aspect of this measure, the body of law to be amended to increase taxes.

(b) This error violates the Colorado Constitution and state statute.

The requirements for precise wording of ballot titles are so obvious and so often repeated in Colorado law that they can be taken for granted. Given the centrality of those requirements to the Board's errors in describing the new tax, however, the specific mandates that were violated bear recitation here.

First, the Colorado Constitution requires that the single subject statement – the first phrase of a ballot initiative – be *clear*. "No measure shall be proposed by petition containing more than one subject, which shall be **clearly expressed** in its title…." Colo. Const., art V, sec. 1(5.5) (emphasis added). "A sufficiently clear title 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

[3] Accord, *American Heritage Dictionary of the English Language* 263 (3d ed. 1996) ("by" defined as "[t]hrough the agency or action of"); *Webster's Third New Int'l Dictionary* 307 (unabridged) (1993) ("by" defined as "through the means or instrumentality of); *Black's Law Dictionary* 201 (6th ed. 1990) ("by" defined as "through the means, act, agency or instrumentality of").

proposal.'" *In the Matter of the Title, Ballot Title, and Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶21, 274 P.3d 576, 581-582 (citation omitted). The title's confusing reference to where this new tax is created is anything but clear; a voter who was unfamiliar with the subject matter of this proposal would not know to discount the Title Board's representation that this measure enacts a tax by amending the Constitution. Moreover, state statute requires that the title be *accurate* as well as *true*. The "title" is "a brief statement that fairly and **accurately** represents the **true** intent and meaning of the proposed text of the initiative." C.R.S. § 1-40-102(10). It is inaccurate to say that, under this measure, taxes are increased "by an amendment to the Colorado Constitution." Because taxes are increased by a statutory change, that statement is not true either. Thus, voters will be actively misinformed by the Board's title.

Finally, Colorado law mandates that the title be *correct* and *unambiguous* in describing the measure. "The title for the proposed law or constitutional amendment, which shall **correctly** and fairly express the true intent and meaning thereof…. Ballot titles… shall **unambiguously** state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(b). But it is plainly incorrect to state that taxes are increased by constitutional amendment here, and the vague statement used to introduce this ballot measure in the title is the height

of ambiguity by leaving voters with the impression that this is a constitutional tax. As noted above, the Constitution provides that the principle to be adopted must be "clearly expressed." Colo. Const., art V, sec. 1(5.5). A title that leaves such an important detail to voters' imaginations is both ambiguous and unclear.

In addition, this Court has long recognized that the order in which an initiative's elements are described in the title can mislead voters. In *In the Matter of the Title, Ballot Title and Submission Clause Respecting the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d 733 (Colo. 1994), the Court considered a ballot measure that authorized limited gaming in one new town and changed the rules for all gaming towns where gaming was already operational. The Board listed those various changes in an order that would have led voters to confuse which changes applied in which jurisdictions.

The Court recognized that the Board retains discretion to choose the order in which the title describes the elements of an initiative. That discretion is not boundless, however. "[W]hatever arrangement the Board selects cannot be misleading. Here, the title and submission clause are misleading because of the order in which the material is presented." *Id.* at 742 (citations omitted).

As to Initiative #315, the Board confused the order of the description of the new tax and the new preschool program. The new tax on nicotine vapor products

would be solely a creation of statute. In contrast, the preschool program would be set up by statute but funded using revenue from the new statutory tax as well as a diversion of an existing constitutionally set tax on cigarettes and tobacco products. However, the Board ordered the title in a way that directly links the $6.3 million of new state taxes to the amendment of the Constitution. That erroneous linkage will confuse voters.

The Board considered options to make the title clear, true, and accurate. It considered rewording the single subject statement in the title to qualify the linkage between the $6.3 million of new taxes and the Constitution, and it also considered including "statutory" to modify "tax" later in the title.[4] But the Board rejected those options and thus chose to retain language that is inherently misleading. The Board also could have chosen to correct the single subject statement concerning the two bodies of Colorado law being amended. For instance, the title would have been accurate if revised to include the underlined phrase below:

> SHALL STATE TAXES BE INCREASED $6,300,000 ANNUALLY BY <u>A CHANGE TO THE COLORADO REVISED STATUTES AND SHALL THERE BE</u> AN AMENDMENT TO THE COLORADO CONSTITUTION AND A CHANGE TO THE COLORADO REVISED STATUTES CONCERNING A NEW PRESCHOOL PROGRAM THAT IS FUNDED WITH REVENUE GENERATED

[4] https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=172 (at 2:37:30-2:47:20).

BY STATE TAXES ON TOBACCO AND NICOTINE PRODUCTS, AND, IN CONNECTION THEREWITH,….

In this manner, the statutory nature of the new tax would be clear to voters, as would the constitutional change to fund the preschool program and the statutory provisions relating to the standards and objectives of that new program.

A change such as this one is not, as Respondents and the Board are likely to argue, an effort to write the "best possible" ballot title. "Perfection is not the goal; however, the Title Board's chosen language must not mislead the voters." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999) ("*#29*"). The title set for #315 does not pass the basic test of accurately informing voters about this measure because it misstates where the new tax is placed in Colorado law.

Whether this Court finds the Board's title to be unclear, inaccurate, untrue, incorrect, or ambiguous, or whether the Court finds that the order of #315's key elements was misleading, it must find that the Board erred to an extent that requires correction to the title.

(c) This misstatement in the title is material in misleading voters.

Where the Board errs in a "material and significant" way, its decision must be reversed. *#62, supra*, 961 P.2d at 1082. This misrepresentation about the new tax meets that standard.

First, the Board's language is facially and indisputably wrong about a key aspect of the measure. The tax is not created by, in, or as a part of the Constitution. It is a statutory tax alone. That fact is enough to require reversal of the titling decision because a title that incorrectly describes an initiative text is legally flawed. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #245(b)-(e)*, 1 P.3d 720, 723 (Colo. 2000) (title misstated initiative's change to qualifications of district court judges, requiring reversal of Title Board decision).

Second, a constitutionally established tax raises unique issues in terms of how it could be changed later if the proposed 10% tax rate on nicotine vapor products is found to be too high or too low. A constitutional tax rate can only be reset to a different rate by a subsequent super-majority vote of 55% of Colorado voters, as such an amendment would replace 10% with a different percentage rate and thus add new words to the Constitution. Colo. Const., art. V, sec. 1(4)(b) ("an initiated constitutional amendment shall not become part of this constitution unless the amendment is approved by at least fifty-five percent of the votes cast thereon"). In contrast, a statutory tax can be lowered by the legislature or, pursuant to TABOR, increased with a bare majority at a subsequent election. Voters reading this title would think that the only way to change the rate of this new tax would be by a 55% vote of the people at a later election. That perception would be plainly wrong.

Finally, voters rely on the distinction between constitutional and statutory changes, as evidenced by the General Assembly's requirements that this distinction be crystal clear. A constitutional change is referred to as an "amendment," and a statutory change is referred to as a "proposition." C.R.S. § 1-5-407 (5)(b)(I), (II). "In order to avoid confusion between" these two types of changes to two distinct bodies of law, the Board must "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); *see also #29*, *supra*, 972 P.2d at 267 (vagueness in Board's wording choice for title was "promotes voter confusion"). Finally, the pre-election analysis of ballot measures that is sent to all voters must identify "amendments" and "propositions" specifically under those separate labels. C.R.S. § 1-40-115(2)(a). There is no point to differentiating between these different types of legal change at all points of the initiative process if the alteration of one body of law can be indiscriminately described as a change to the other.

In the words of one of the Board members, "it doesn't matter too much whether the tax is constitutional or statutory."[5] For the reasons stated above, that

[5] https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=172 (at 2:37:20-30).

conclusion, even though endorsed by the Board as a whole, was incorrect and warrants reversal of the decision below.

2. 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 #315 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 #315, 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 #315 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 #315 at 6.[6] 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 & 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.

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

[6] 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/2019-2020/315FiscalImpact.pdf

#315 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 #315 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."[7] 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.

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 #315 should be reversed.

In particular, this case provides the Court with an opportunity to direct the Title Board to be conscious of wording TABOR measures in a way that does not mislead voters about the laws that are being changed to increase their taxes. For this tax increase and those that are proposed in the future, a reversal of the Title Board as to this issue is critical.

[7] https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2019-2020/250Results.html

Respectfully submitted this 15th 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 #315 ("TOBACCO TAX REVENUE FOR NEW STATE PRESCHOOL PROGRAM")** was sent electronically via CCEF this day, May 15, 2020, to the following:

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