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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2), C.R.S. (2019-2020) 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") **Petitioners**: ANNA JO HAYNES, v. **Respondents**: MONICA VONDRUSKA and JON CALDARA, and **Title Board:** THERESA CONLEY, DAVID POWELL, and JASON GELENDER.	▲COURT USE ONLY▲
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RESPONDENTS' ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains 5,856 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

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Respondents Monica Vondruska and Jon Caldara ("Proponents"), registered electors of the State of Colorado and the designated representatives of the proponents of Initiative 2019-2020 #315 ("Initiative #315"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit their Answer Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #315 and in response to the Opening Brief submitted by Petitioner Anna Jo Haynes ("Objector").

SUMMARY OF ARGUMENT

Objector's single subject argument is based on two false premises that are derived from her misconstruction of Initiative #315. First, Objector asserts that no connection exists between the banning reallocation provision and the funding of a new preschool program. The only way Objector can make this argument is by glossing over a critical aspect of the banning reallocation provision: Cigarette tax rebates that would otherwise go to local governments—if not for a future ban—are reallocated to the new preschool program to preserve its tax funding base.

Objector fails to acknowledge this direct connection anywhere in her single subject argument. While the policy reasons behind this provision are irrelevant to the single-subject inquiry, this provision makes sense because it shores up revenue

streams for the new preschool program if the tax base from tobacco and nicotine products is eroded by future bans.

The second false premise at the heart of Objector's single subject argument is that Initiative #315 "insert[s] a ban on policy making" by "prevent[ing] [local] legislators from acting." Initiative #315 does no such thing—local governments are free to ban the sale of tobacco and nicotine products, but if they do, they will forego their share of state cigarette tax revenues. How state cigarette taxes are apportioned is a function of state legislative authority, not local authority, and therefore Initiative #315 in no way alters the authority of local governments to legislate at a local level.

As for clear title, Objector understands her substantive arguments fail, so she now asks this Court to set aside statutory brevity requirements and decades of clear-title jurisprudence to demand more detail in the Titles than is required by existing law. The sole basis for her argument is that, pursuant to the Governor's Executive Order suspending certain in-person petition gathering requirements, petition signers will not have the full text of ballot measures when signing. This argument misstates the Executive Order, which expressly requires the Secretary of State to adopt rules that require petition signers to have the entire text of ballot measures when signing.

With respect to her substantive clear-title arguments, Objector continues to nitpick the Titles by contending that they do not clearly state whether the new vaping

tax originates in the Constitution or in statute. However, voters care about whether there is a new tax, not about the legal origin of that tax. Objector fails to explain how this alleged error in the Titles could possibly mislead a voter into supporting or opposing Initiative #315.

Objector also continues to overstate the importance of the banning reallocation provision by speculating as to its future effects. The Title Board, after hearing all the arguments below, correctly determined that the banning reallocation is not a central feature and that the increased length in the Titles needed to accurately describe this provision—which provides one of several tobacco-related funding sources—is unwarranted. The Court should defer to the Title Board's broad discretion on this issue rather than accept Objector's hyperbole as to the alleged future effects of this provision.

Finally, with respect to Objector's last clear-title argument that the Titles should identify certain programs that will be impacted by the reallocation of funds, Objector does not contend that the Titles Board's succinct description of the affected programs is inaccurate. Rather, Objector reasons that her desire to identify certain handpicked programs of her own choosing should trump the Title Board's statutory obligation to make ballot titles brief. Objector fails to cite any applicable authority for her proposition that the Titles must identify specific examples of the affected

programs. Consequently, the Title Board was well within its broad discretion in determining that a concise summary of the affected programs is best suited for the Titles here.

ARGUMENT

A. Standard of Review/Preservation.

Objector's recitation of the standard of review does not recognize the deference this Court gives to the Title Board on both single-subject and clear-title issues. Objector's Opening Br. at 7-9. The Court reviews both issues for clear error. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176, 179 (Colo. 2014) ("[The Court] liberally construe[s] the single subject requirement and 'only overturn[s] the Title Board's finding that an initiative contains a single subject in a clear case.'") ("[W]e grant great deference to the Title Board's decisions [in setting Titles]. As such, we only reverse the Titles where the language is 'clearly misleading.'" (internal citations omitted)).

As stated in their Opening Brief, Proponents agree that the issues raised on appeal were preserved.

B. Objector's Single-Subject Argument Is Premised on Her Misconstruction of the Banning Reallocation Provision.

As the Title Board recognized, the banning reallocation provision is an implementing provision aimed at preserving funding for the new preschool program

and is directly connected to Initiative #315's central purpose of funding a new preschool program. Objector is therefore forced to misconstrue Initiative #315's banning reallocation provision in two critical ways in an attempt to create a second subject. This section addresses each of these two errors in turn. Finally, this section addresses Objector's legal authorities that, when accounting for her errors in interpreting the banning reallocation provision, support the Title Board's single subject determination.

1. Objector Fails to Recognize the Connection Between the Banning Reallocation Provision and the Central Purpose of Funding a New Preschool Program.

Not once in Objector's five-page single-subject argument does she acknowledge the direct connection between the banning reallocation provision and Initiative #315's central purpose of funding a new preschool by reallocating tobacco and nicotine-related tax revenues. Objector's Opening Br. at 9-14. Specifically, the portion of state cigarette tax revenues that would otherwise go to a local government—if not for a future ban on tobacco and nicotine products—are reallocated to the new preschool program to preserve the program's tax funding base. R., pp. 4-5, Proposed § 39-22-623(1)(a)(II)(A), C.R.S. Objector's Opening Brief simply glosses over this aspect of the banning reallocation provision.

Instead, Objector contends that Initiative #315 proposes a "program plus restriction on lawmaking" with no linkage between the two. *Id.* at 10. As discussed below, Objector's contention that Initiative #315 restricts lawmaking is wrong, but more importantly, the threshold premise of no connection between the banning reallocation provision and the funding of Proponents' new preschool program is meritless.

To the extent Objector chooses to recognize this direct connection in her Answer Brief, the Court should reject any follow-up argument that the banning reallocation is not "properly" connected to the funding of the preschool program. While Objector argued below and in her Answer Brief on Initiative 2019-2020 #293 (a companion measure to Initiative #315) that Proponents are not justified in utilizing the banning reallocation as a funding mechanism, this Court does not consider the merits of a proposed measure as part of the single-subject inquiry.[1] *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d

[1] The alleged lack of "justification" for the banning reallocation provision was the focus of Objector's Motion for Rehearing before the Title Board. R., p. 11. This argument was reasserted in Objector's Answer Brief on Initiative #293. *See* Objector's Answer Br. for Initiative #293 at 4-5 (arguing about the policy rationale for the banning reallocation provision based on speculation that the phrase "tobacco and nicotine products" would not apply to cigarettes).

1094, 1097 (Colo. 2000) ("In conducting our single-subject review, we do not make policy—that role belongs to the initiative sponsors and, ultimately, to the voters.")

Nevertheless, Objector continues to frame the banning reallocation provision as a second subject in her Opening Brief by injecting policy-based arguments that attack the wisdom of the provision. *See, e.g.*, Objector's Opening Br. at 13 (sensationally—and incorrectly—contending that Initiative #315 will cause voters to "los[e] the ability to keep [their children] safe"); *id.* at 14 (arguing "[t]he relative desirability of local bans"); *id.* at 9-10 (repeatedly—and incorrectly—contending that Initiative #315 "bans" local policymaking).[2] While Proponents' policy reasons behind the banning reallocation provision are irrelevant to the single-subject inquiry, this provision makes sense because Proponents need to fund their new preschool program and have chosen to do so by reallocating state revenues from tobacco and nicotine taxes. The banning reallocation provision shores up these revenue streams if the tax base from tobacco and nicotine products is eroded by future local bans. *See* R., p. 6, Proposed § 39-28-110(1), C.R.S. (reallocating portion

[2] Aside from the fact that local governments are still free to ban the sale of tobacco and nicotine products, Objector's contention that Initiative #315 takes away voters' ability to "keep their children safe" ignores that the minimum purchase age for tobacco and nicotine products was raised from 18 to 21 in 2019 by federal legislation. *See* *https://www.colorado.gov/pacific/enforcement/tobacco-enforcement*. Regardless of whether jurisdictions enact a ban, these products cannot be sold to children.

of statutory cigarette tax); *id.* at Proposed § 39-28.5-108(1), C.R.S. (reallocating portion of statutory tobacco taxes).

Consequently, Objector's repeated characterization of the banning reallocation provision as a "financial penalty" is incorrect. Nothing in the record supports Objector's imputation of a punitive purpose behind this provision. Rather, as the Title Board recognized, logical policy dictates that local governments that do not collect any state cigarette tax revenues should not expect or get a proportionate share of those tax revenues.[3] Instead of providing banning jurisdictions a windfall on cigarette tax revenues, Initiative #315 establishes another tobacco-related revenue stream by reallocating the windfall funds to the new preschool program.[4]

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[3] Rehearing Before Title Board on Proposed Initiative 2019-2020 #293 (April 15, 2020, *available at* https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=165 (discussion at 3:00:30-3:02:11) (addressing identical issue on 2019-2020 #293).

[4] In her Answer Brief to Initiative #293, Objector speculates as to future effects of the banning reallocation provision in contending that the reference to bans on "tobacco and nicotine products" would apply to bans on non-cigarette tobacco products but not to bans on cigarettes themselves. *See* Objector's Answer Br. for Initiative #293 at 4-5. However, this Court does not consider the initiative's merits and does not review its "efficacy, construction, or future application." *In re 2013-2014 #89*, 328 P.3d at 176 (internal quotation omitted). Moreover, Objector's speculative argument is wrong because it is based on the erroneous legal application of the statutory definition of a different term ("tobacco products" as opposed to "tobacco and nicotine products") from an inapplicable statutory section. *See* Objector's Answer Br. for Initiative #293 at 4 (relying on the definition of "tobacco products" from § 39.28.5-101(5) in construing Proposed § 39-22-623(1)(a)(II)(A),

Accordingly, the banning reallocation provision is directly related to the funding of the new program and does not create a second subject. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 #256*, 12 P.3d 246, 254 (Colo. 2000) ("Just because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected that it necessarily violates the single-subject requirement. It is enough that the provisions of a proposal are connected."); *In re 1999-2000 No. 258(A)*, 4 P.3d at 1097 ("Implementing provisions that are directly tied to the initiative's central focus are not separate subjects.")

2. Objector Incorrectly Characterizes the Banning Reallocation Provision as Altering Local Legislative Authority.

In an attempt to fit Initiative #315 within the framework of the inapposite single-subject case law cited in the Opening Brief, Objector repeatedly mischaracterizes Initiative #315 as barring municipalities from exercising their local legislative authority to ban the sale of tobacco and nicotine products. Objector's Opening Br. at 9, 10, 12, 13, 14. The following are instances of Objector's Opening Brief misconstruing the banning reallocation provision in this way:

C.R.S., when this definition applies only as that term is used in Article 28.5); C.R.S. § 39.28.5-101 (prefacing the definitions with, "[a]s used in this article . . . .").

- Describing Initiative #315 in terms of a "ban on policy making." *Id.* at 9 (emphasis added).
- Comparing Initiative #315 to measures that "enact[] one policy and then prevent[] legislators from acting as to a separate one." *Id.* (emphasis added).
- Comparing Initiative #315 to a measure that "negate[d] the power of the General Assembly to exercise legislative supervision." *Id.* at 10 (emphasis added).
- Describing Initiative #315 as forcing local governments to "foresak[e] legislative prerogatives." *Id.* (emphasis added).
- Characterizing Initiative #315 as a measure that "would deprive the legislators they elect from exercising any authority." *Id.* at 12 (emphasis added).
- Describing Initiative #315 as causing voters to "los[e] the ability to keep th[eir] children safe." *Id.* at 13 (emphasis added).
- Characterizing Initiative #315 as imposing a "significant change to the policy making right of legislators." *Id.* at 13-14 (emphasis added).

Simply saying a thing over and over does not make it true. In reality, if Initiative #315 were to pass, local governments would still be free to ban the sale of

tobacco and nicotine products, but if they do, their share of state cigarette tax revenues will be reallocated to the new preschool program. R., pp. 5-6, Proposed § 39-22-623(1)(a)(II)(A), C.R.S. But how state cigarette taxes are apportioned is a function of state legislative authority (whether through initiative or through the General Assembly), not a matter of local authority, and therefore Initiative #315 does not alter the authority of municipalities to legislate at a local level.

3. When Correctly Framing Initiative #315, the Case Law Cited by Objector Supports a Single-Subject Determination.

Objector couches the banning reallocation as having no connection to the funding of the preschool program and as altering local legislative authority so that she can shoehorn inapposite case law into her single subject analysis. When correctly framing the banning reallocation for what it is, the cited authorities support the Title Board's single subject determination.

Objector relies primarily on this Court's decision in *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071 (Colo. 2010) to support her single subject argument. Objector's Opening Br. at 9-14. In that case, the central purpose of the measure was the imposition of a new tax on beverage containers to fund the preservation of state waters. *In re 2009-2010 No. 91*, 235 P.3d at 1073. Separately, the measure prohibited the General Assembly from "altering the statutes

currently governing" state agencies in charge of certain water issues "or from creating or empowering any other agency with authority to supersede or be superior to" those state agencies. *Id.* Proponents of 2009-2010 #91 included these provisions in the same measure under the "broad stated purpose 'to protect and preserve the waters of the state.'" *Id.* at 1073.

This Court held that the provisions prohibiting the General Assembly from acting and granting significant new authority to certain state water agencies was a second subject. *Id.* at 1076. This Court reasoned that these provisions had no connection to the central purpose of imposing a new beverage tax to fund water conservation. *Id.* at 1079. Moreover, these provisions fundamentally altered the General Assembly's legislative authority and the authority of the state water agencies and thus were not implementing provisions. *See id.*

In contrast, here, Initiative #315 has a narrow purpose: to fund a new preschool program by reallocating state revenues from tobacco and nicotine products. Additionally, the banning reallocation provision is one of several available revenue sources created by reallocating tobacco-related tax revenues and thus is directly connected to the central purpose of funding the new preschool program with reallocated revenues. Further, unlike 2009-2010 #91, Initiative #315 does not alter, let alone fundamentally change, the legislative authority of a governmental body.

When viewing Initiative #315 through this lens, *2009-2010 No. 91* supports the Title Board's single-subject determination. *Id.* at 1076 ("An initiative may contain several purposes, but they must be interrelated to avoid violating the single-subject requirement."). As the Court recognized in *2009-2010 No. 91*, if provisions are connected to the measure's central purpose, the "mere fact that a proposed constitutional amendment may affect the powers exercised by government under preexisting constitutional provisions does not by itself demonstrate that the proposal embraces more than one subject." *Id.* at 1077 (citing *In re 1999-2000 # 258(A)*, 4 P.3d at 1097-98) (provision impacting power of school boards did not create a second subject because provision was connected to central purpose of requiring public school students to be taught in English)).[5]

Furthermore, because Initiative #315 is a straightforward measure that reallocates various tobacco and nicotine-related revenues to fund a new preschool program, it does not present the voter-surprise problem posed by *2009-2010 No. 91*. The reallocation concept is clearly identified in the Titles and the banning

[5] Like *2009-2010 No. 91*, the Objector's other authorities are inapposite. *See* Objector's Opening Br. at 11 (citing *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 448 (Colo. 2002) (finding additional subject where measure altered voters' legislative authority by prohibiting certain initiative petitions because this prohibition had no connection with, and was contrary to, the central purpose of liberalizing the initiative process).

reallocation provision is just one example of such a reallocation. Additionally, as the Title Board correctly reasoned, voters would not be surprised to learn that, if their local government opts to ban the sale of a good that is currently taxed, the local government will forego state sales tax on that good.[6]

In sum, if Objector disagrees with the banning reallocation provision, she is free to make this an issue on the campaign trail. This provision does not, however, create a second subject, and therefore Initiative #315 should go to the voters to decide on the merits.

C. The Titles Succinctly and Accurately Describe the Measure and Are Not Misleading.

1. Objector's Argument for a Heightened Clear-Title Standard Is Baseless.

Before addressing Objector's substantive clear-title arguments, it is necessary to address a new argument raised in Objector's Answer Brief on Initiative #293 concerning the standards this Court should apply in assessing the adequacy of the Titles. Objector's Answer Br. for Initiative #293 at 10-13. Because her clear-title

[6] Rehearing Before Title Board on Proposed Initiative 2019-2020 #293 (April 15, 2020, *available at* https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=165 (discussion at 3:00:30-3:02:11) (addressing identical issues on 2019-2020 #293, board member Gelender explaining that concerns over additional length and complexity outweighed notice considerations because the banning allocation provision is not a central feature).

arguments otherwise fail, Objector contends that this Court should set aside statutory brevity requirements and decades of clear-title jurisprudence to demand more detail in the Titles than is required by existing law. *Id.* The sole basis for her argument is that, pursuant to Governor Polis's Executive Order D 2020 65 suspending certain in-person petition gathering requirements ("Executive Order"), petition signers will not have access to the text of initiatives when signing petitions. *Id.* at 11-12 ("Without the initiative text, voters could sign this petition and very possibly have no idea what they are signing onto.").

This fundamental underlying premise is false. Objector misstates the Executive Order, which clearly provides that the Secretary of State "must" adopt temporary emergency rules that require registered electors to be provided "with information about the ballot issue that would ordinarily be printed on the signature petition" and that the "full text of the ballot issue must accompany the petition for signature." Objector's Opening Br. at Ex. 1, Executive Order at ¶¶ G, G.b, and G.c (emphasis added). Consequently, whether traditional petition gathering requirements or the temporary emergency rules apply, petition signers will have the full text of Initiatives #293 and #315.[7] The Court should reject Objector's request

[7] This Executive Order has been challenged in *Ritchie v. Polis*, No. 20CV031708, Denver District Court. On May 27, 2020, Judge Robert McGahey issued an order ruling against the challenge, which order is subject to appeal.

to apply a new and higher standard for detail in titles on the basis of the Executive Order.

2. The Language at the Beginning of the Titles Is Required by Applicable Law and Is Not Misleading.

As a threshold matter, Objector's clear-title argument on this issue fails to recognize that the tax language at the beginning of the Titles is required by TABOR. Objector's Opening Br. at 14-23; *see also* Colo. Const. art. X, § 20(3)(c). Objector's argument also fails to recognize that section 1-40-106(3)(c), C.R.S., requires the Title Board to explain that Initiative #315 amends both constitution and statute. As set forth in the Title Board's Opening Brief, the Title Board was well within its broad discretion to state first that the measure amends the Colorado Constitution and then that it changes statutes. Title Board's Opening Br. at 14.[8] Because Objector fails to recognize that the Title Board was working within these legal parameters, her clear-title analysis is selectively incomplete and does not afford the Title Board the deference it is owed in setting Titles. *In re Proposed Initiative on Trespass-Streams*

[8] Citing Rehearing Before Title Board on Proposed Initiative 2019-2020 #315 (Apr. 23, 2020) (Board member Gelender stating, "I do think we should list the constitution first because I think people tend to want to know that first before they care about amendments to the statute.").

with Flowing Water, 910 P.2d 21, 23 (Colo. 1996) ("Court will engage in all legitimate presumptions in favor of the propriety of the Board's action.")

Regardless, even without these countervailing considerations, Objector's contention that the Titles are materially misleading is unpersuasive. Setting aside the materiality requirement, Objector contends that the titles are facially misleading because they represent that either: the new vaping tax is created in the Constitution or in the Constitution and in statute. Objector's Opening Br. at 15-16. However, this reading artificially compartmentalizes the language at the beginning of the Titles. When read as a whole, the Titles indicate that state taxes are being increased by a measure that amends both the Constitution and statute, which is both accurate and compliant with applicable law. R., p. 15. After providing the required TABOR language and indicating that the measure amends both Constitution and statue, the Titles then concisely and accurately state the single subject of Initiative #315 as "concerning a new preschool program that is funded with revenue generated by state taxes on tobacco and nicotine products." R., p. 15.

Accordingly, the Titles are not misleading. At most, the Titles are silent on whether the new vaping tax is in the constitutional or statutory amendments but that is not a central feature—not even Objector contends that it is. *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d at 24 ("The title must

consist of a brief statement accurately reflecting the central features of the proposed measure.")

Even if the Court accepts Objector's premise that the Titles could confuse voters as to the legal origin of the new vaping tax, the Court reverses the Title Board only if the Titles are materially and significantly incorrect. *In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999) ("We will not 'rewrite the titles or submission clause for the Board, and we will reverse the Board's action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation.'"). An error is material and significant if voters "will be misled into support for or against a proposition by reason of the words employed by the board." *Id.* (quoting *In re Ballot Title "1997–1998 #62",* 961 P.2d 1077, 1082 (Colo. 1998)).

Objector's clear-title argument falls apart when applying the materiality requirement. Objector fails to articulate how a voter would be misled to vote for or against Initiative #315 based on his or her alleged confusion as to whether the vaping tax is constitutional or statutory. Voters care that there is a new tax, not what the legal origin of that tax is. Objector would be hard-pressed to find any voter that would be misled into concluding, "I'm in favor of constitutional taxes, but not statutory taxes, so I'll vote for Initiative #315."

While Objector strains to demonstrate materiality by arguing that constitutional taxes are harder to change based on the 55% requirement set by the Colorado Constitution, this is not a reason that the average voter—even those who are election lawyers—votes for or against a new tax. The Title Board correctly understood this dynamic and therefore rejected Objector's proposal to change the required language at the beginning of the Titles by adding unnecessary length to address an issue that is not material to voters.[9]

Because the alleged error in the Titles is not material, the case law that Objector relies upon is inapposite. In those cases, unlike here, the titles contained an error as to an important substantive aspect of the measures, and thus the errors were material. Objector's Opening Br. at 19, 22 (citing *Matter of Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in City of Antonito*, 873 P.2d 733, 742 (Colo. 1994) (titles buried key provision concerning "far-reaching" statewide changes to limited gaming within provisions authorizing limited gaming

[9] Rehearing Before Title Board on Proposed Initiative 2019-2020 #315 (April 23, 2020, *available at* https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=172 (discussion at 2:37:20-30). Objector's proposed revisions at pages 20-21 of her Opening Brief should be rejected for the same reasons. Additionally, this proposed change makes it seem as if the proposed tax increase is disconnected from the measure's central purpose of creating a new preschool program. This alternative Title is therefore not only longer, but also inferior.

in one particular city such that voters could be misled into believing the statewide changes only applied to the particular city); *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 Nos. 245(b), 245(c), 245(d) & 245(e)*, 1 P.3d 720, 723 (Colo. 2000) (ballot title and summary conflicted with one another concerning substantive aspect of the measure as to qualifications for district court judges).

3. The Banning Reallocation Provision Is Not a Central Feature.

In her Opening Brief, Objector exaggerates the meaning and significance of this provision to overstate its importance in an effort to frame it as a central feature that must be specifically identified and described in the Titles. As discussed above, Objector repeatedly mischaracterizes the banning reallocation provision as altering local legislators' ability to legislate. Objector's Opening Br. at 9, 10, 12, 13, 14. In her clear-title argument, Objector also continues to wrongly impute a punitive purpose behind the provision when its purpose is to preserve tax revenues for the new preschool program if the tax base for tobacco and nicotine products is eroded by future local bans. Objector's Opening Br. at 24 (referring to provision as a "penalty provision").

Objector also overstates the potential impact of the banning reallocation provision. As recognized by both Objector and Proponents below, the banning reallocation provision is a prospective provision that will apply to future local bans,

if any, of tobacco and nicotine products.[10] Consequently, Initiative #315 will not result in local jurisdictions losing cigarette tax revenue unless an additional step is taken to ban the sale of tobacco and nicotine products.[11] The Title Board reasoned that the contingent nature of this provision and the fact that local jurisdictions can assess the potential financial impacts prior to enacting a ban undermine Objector's contention that this provision is a central feature.[12]

Finally, Objector continues to overstate the breadth of the banning reallocation provision as applying to any form of regulation of tobacco and nicotine products, such as regulations against the sale to minors, from vending machines, or in packaging "other than the manufacturer's packaging." Objector's Opening Br. at 11. As the plain language makes clear, the proposed provision applies to "bans," not

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[10] Rehearing Before Title Board on Proposed Initiative 2019-2020 #293 (April 15, 2020, *available at* https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=165 (discussion at 2:13:00-2:13:10) (Objector's counsel recognizing that provision applies to "future governmental action").

[11] As for the potential revenue at stake, the $8.8 million annual figure cited by Objector is the total collective amount for the hundreds of towns, cities, and counties in Colorado. Consequently, if a local government decided to ban the sale of tobacco and nicotine products, the revenue it would lose would be a very small fraction of the statewide $8.8 million. § 39-22-623(1)(a)(II)(A), C.R.S.

[12] Hearing Before Title Board on Proposed Initiative 2019-2020 #293 (April 1, 2020, *available at: https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=159* (discussion at 3:40:55-3:41:30) (board member Gelender explaining that titles generally do not describe prospective features that are contingent on future action).

to any form of regulation as Objector contends. R., p. 5, Proposed § 39-22-623(1)(a)(II)(A).

Aside from overstating the importance of the banning reallocation provision, Objector makes no attempt to balance her alleged notice concerns against the requirement that ballot titles be brief. Objector does not propose alternative language that would succinctly and accurately describe the banning reallocation. In contrast, the Title Board spent significant time and energy going through this exercise.[13] After carefully weighing considerations of clarity and brevity, the Title Board determined that the banning reallocation provision is an implementing provision that does not need to be specifically identified and described in the Titles.[14] That decision was well within the broad discretion the Title Board enjoys in setting ballot titles.

[13] Rehearing Before Title Board on Proposed Initiative 2019-2020 #293 (April 15, 2020, *available at* https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=165 (discussion at 3:01:04-:3:02:10) (weighing the detail and complexity that would be required to fairly and accurate summarize this provision against the limited benefit of additional notice).

[14] *Id.*

4. The Titles Succinctly and Fairly Describe that Initiative #315 Reallocates Revenue from Health-Related Programs.

Objector does not contend that the Title Board's succinct summary of programs affected by the reallocation of revenues is inaccurate. Objector's Opening Br. at 14-16. Rather, Objector amorphously argues that the Title Board erred when it elected not to significantly lengthen the Titles by "listing the names of several of the key programs affected." Objector's Opening Br. at 27. Objector does not precisely identify which programs she believes are the "key programs" or why those programs should be considered "key" programs. *Id.* Nor does Objector propose alternative language to describe these key programs because doing so would highlight the significant length that would require. *See id.* at 25-28.[15]

Instead, Objector vaguely alludes to certain programs affected by one of four revenue sources reallocated by Initiative #315, i.e., the tobacco settlement funds. Objector's Opening Br. at 15 (identifying four programs affected by the reallocation of settlement funds). The Opening Brief fails to explain why these particular programs allegedly warrant identification in the Titles or whether their identification

[15] In her Answer Brief on Initiative #293, Objector still does not propose alternate language, but instead compares the length of the Titles here to those for other tobacco-related measures. Answer Br. #293 at 8-9, n.1, n.4. But the length of those titles was attributable to the proponents' decision to describe all the programs that would be funded with tobacco moneys. *Id.* Here, there is one program being funded, a new preschool program, which is described in the Titles.

would remedy the alleged clear-title deficiencies. *See id.* While Objector is silent as to the criteria she used to flag these programs, it appears that she arbitrarily chose a threshold percentage of the share of tobacco settlement funding as her sole barometer. *See id.*

The lack of any reasoned standard behind Objector calling out these particular programs reveals why the Title Board opted for a concise and accurate summary. Identifying all the affected programs would have rendered the Titles unreasonably long and useless as a "brief" summary of Initiative #315, as Colorado law requires. 1-40-106 (3)(b), C.R.S. Identifying only certain programs handpicked by Objector, while also adding significant length to the Titles, would have put the Title Board in the improper position of making blind value judgments as to which programs should or should not be identified.

Because the Title Board has considerable discretion in deciding what level of detail to put in ballot titles, Objector cannot cite a single case in which the Title Board erred by summarizing programs impacted by a measure's funding choices as opposed to identifying specific examples of such programs.[16] The only case

[16] Aside from case law, Object references, without any citations, an instance this cycle where the Title Board provided a description of a new program created by Initiative 2019-2020 #250. While this example has no precedential effect, it is also not persuasive. The proposed "out-of-school learning opportunities program" is the centerpiece of the Initiative 2019-2020 #250, but that is not a phrase that voters

Objector cites in support of this clear-title argument is *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24. Objector's Opening Br. at 27. In that case, the measure made significant substantive changes to the recall process for elected officials without identifying or describing those changes. *Id.* at ¶¶ 25-31. The Court reasoned that these significant changes to state election law were central features that should be identified in the Titles. *Id.* at ¶ 32.

In contrast, here, not even Objector contends that the identity of each specific program impacted by the reallocation of revenues is a central feature of Initiative #315. Rather, the central feature at issue is that tobacco and nicotine-related revenues will be reallocated from certain health-related programs, which is exactly what the Titles describe. This Court has upheld the use of concise summaries such as that utilized by the Title Board, particularly where the alternate proposal is incomplete or otherwise misleading. *See In re Title, Ballot Title & Submission Clause for 1997-98 #62*, 961 P.2d 1077, 1082-83 (Colo. 1998) (affirming use of summary phrase, "establishing priorities for eligibility for [a tax] credit," instead of

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would readily know or understand, so the Title Board correctly provided examples of out-of-school learning opportunities for illustrative purposes. In contrast, here, the programs targeted for reallocation have no relationship to one another except that they are generally health-related programs that receive a portion of their funding from tobacco and nicotine-related revenue sources, which is exactly what the Titles describe.

a more detailed description, in part, because objector's lengthier proposal was incomplete and potentially misleading). In *1997-98 #62*, this Court relied on the brevity requirement in concluding that the Titles did not need to specifically identify the tax credit priorities at issue. *Id.* The titles provided notice of the prioritization aspect, and voters could look to the Blue Book or the text of the measure itself for details on what those priorities were. *Id.*

Here, the Titles make no bones of the fact that certain health-related programs will lose funding. Voters can easily look to the Blue Book or the text to understand precisely which programs will be impacted and how they will be impacted. Accordingly, the Title Board acted well within its broad discretion in using a concise and accurate summary to describe the impacted programs.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's title setting for Initiative #315.

Respectfully submitted this 29th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2020, a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** was duly filed with the Court and served via CCEF upon the following:

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