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COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the 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 Jason Gelender.	▲ **COURT USE ONLY** ▲
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THE TITLE BOARD'S ANSWER BRIEF

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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,510 words.

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.

s/ *Grant T. Sullivan*

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Assistant Solicitor General

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SUMMARY OF THE ARGUMENT

This Court should affirm the title as set by the Title Board for Proposed Initiative 2019-2020 #315 ("#315") for the reasons stated in the Board's opening brief and its briefing on the related Proposed Initiative 2019-2020 #293.[1] This answer brief responds to the arguments raised by Petitioner/Objector Anne Jo Haynes' opening brief.

I. The Board correctly determined that #315 satisfies the single subject rule. The funding provision in #315 that redirects tobacco tax funds away from local governments that ban tobacco products is a mere implementing provision, not an impermissible second subject. Unlike the precedent Haynes relies on, #315 does not impose a complete moratorium on local legislation concerning tobacco products. Local governments remain free to regulate tobacco products within their respective jurisdictions.

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[1] As stated in the Title Board's opening brief, #315 is similar to #293, with the exception of #315's addition of a new sales tax on vaping products. Portions of the Board's answer brief in #293 duplicate its answer brief here.

II. The Board's title for #315 also satisfies the clear title rule. The Board's title does not mislead voters regarding the origin of the new vaping sales tax, but rather makes clear that the measure's constitutional and statutory changes work together to implement the new vaping tax for the benefit of a new preschool program. The Board's title also accurately captures each of #315's central features. The case law cited by Haynes confirms this; the title need not set forth detailed examples of #315's several funding sources. Describing only the general categories is sufficient. Similarly, itemizing the nearly one dozen existing government programs that will see reduced funding under #315 is not required. Mandating such detail would wrongly deprive the Board of its drafting discretion and violate the statutory requirement that initiative titles "be brief."

ARGUMENT

I. Haynes' single subject precedent is inapposite.

Haynes resists the Board's finding that #315 contains a single subject, asserting that the measure's "penalty" on local governments that ban tobacco products amounts to a "restriction on lawmaking" that

constitutes a second subject. Haynes' Br. 10. Haynes' single subject argument relies extensively on *In re Title, Ballot Title, Submission Clause for 2009-2010 #91*, 235 P.3d 1071 (Colo. 2010). Haynes' Br. 8, 10-13. But that case bears stark differences from the case at bar.

In re #91 sought to levy a beverage container tax to "protect and preserve the waters of the state." 235 P.3d at 1073. The bulk of the funds collected through the beverage container tax were distributed to Colorado's nine basin roundtables and the interbasin compact committee for uses specified in the measure, including protecting, administering, and developing the state's water resources. *Id.* at 1074.

But in addition to levying a new tax and directing the use of its proceeds, the measure also imposed a four-year moratorium on legislative action by the General Assembly, preventing it from modifying or repealing the initiative's provisions granting the basin roundtables and the interbasin compact committee broad new powers. *Id.* at 1075. The four-year moratorium, this Court explained, was not necessarily and properly connected with the initiative's subject of establishing and administering a beverage container tax that benefited

the state's water resources. *Id.* at 1078. Voters would be surprised to learn that the beverage container tax, if adopted, would also "deprive the legislators they elect from exercising any authority over the basin roundtables and the interbasin compact committee for a substantial period of time." *Id.* at 1079.

Unlike the complete legislative moratorium in *In re #91*, #315 does not impose a moratorium of any kind on local legislative action. Local governments under #315 continue to hold flexibility in regulating—even banning—tobacco and nicotine products within their borders. The only consequence is that, if a local government enacts a ban, it will not receive a portion of the state cigarette and tobacco tax revenue currently authorized by Colorado law. Record at 5-6 (proposed § 39-22-623(1)(a)(II)(A), C.R.S.). Such revenue is instead reallocated to #315's new preschool program.

This reallocation mechanism within #315 is necessarily and properly connected to its single subject of creating and administering a new preschool program funded, in part, by the reallocation of existing taxes and other revenues on tobacco and nicotine products. While a

voter might be surprised to learn that an initiative imposes a complete moratorium on future legislative changes involving tobacco products—something #315 does *not* do—he or she would not be taken aback to learn that a local government considering a ban on tobacco products will lose out on tax revenue generated by such products if the ban passes.

Board member Gelender articulated the point succinctly at the rehearing on #315's related measure: "when a government bans something that previously was not banned and was taxed, there is an expectation that the tax revenue will be lost, so I don't know that would be that surprising [to voters] down the road."[2]

At most, this reallocation mechanism affecting local governments is a mere implementing provision that has differing effects on other provisions of Colorado law. Title Bd. Br. 9-10. This Court has made clear that it requires "more than the omission of a full accounting of potential effects" before it concludes that an initiative contains multiple

[2] *Rehearing Before Title Board on Proposed Initiative 2019-2020 #293* (Apr. 15, 2020), *available at* https://tinyurl.com/y9pc2k5n (statement beginning at minute 3:00:50).

subjects. *In re Matter of Title, Ballot Title and Submission Clause for 2015-2016 #63*, 370 P.3d 628, 632 (Colo. 2016). Under this Court's precedent, the Board correctly concluded that #315 satisfies the single subject rule.

II. The Board's title for #315 satisfies the clear title requirement.

Haynes' clear title arguments are threefold: (1) the title is misleading because it misstates that the new vaping sales tax originates from the Colorado Constitution rather than statute; (2) the title should inform voters about the "penalty" created for local jurisdictions that ban the sale of tobacco or nicotine products; and (3) the title should inform voters about major cuts to existing government programs. Haynes' Br. 14-28. Haynes' first argument is new, while her second and third arguments are also raised in #293. This Court should reject each of Haynes' arguments.

A. The Board's title will not mislead voters regarding the origin of the new sales tax.

Contrary to Haynes' argument, the Board's ordering of the title's language—"State taxes shall be increased $6,300,000 annually by an

amendment to the Colorado constitution and a change to the Colorado Revised Statutes"—is not inaccurate and will not mislead voters. As has been already pointed out, much of this language is required by existing Colorado law, Proponents' Br. 14-15; Title Bd. Br. 13-14, and the Board reasonably chose to give priority in the title to the proposed constitutional amendment over the proposed statutory change. Voters understandably "want to know [about constitutional amendments] first before they care about amendments to the statute."[3]

In addition, Haynes wrongly attempts to disassemble #315's component parts in arguing that the new vaping sales tax is statutory only. That is not the proper lens through which to view the measure or its title. *See In re Title, Ballot Title, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010) (Court "review[s] the initiative as a whole rather than piecemeal and examine[s] individual statements in light of their context.").

[3] *Rehearing Before Title Board on Proposed Initiative 2019-2020 #315* (Apr. 23, 2020), *available at* https://tinyurl.com/yctt99fp (statement by Board member Gelender at minute 2:43:28).

True, #315's new vaping sales tax is actually levied by proposed § 39-28.6-103, C.R.S., which is contained in section 7 of the measure. Record at 7. But the statutory additions in section 7 are designed to work in tandem with the constitutional amendments in section 1. Section 7 states, for example, that the new sales tax revenue must be credited "to the preschool cash fund created pursuant to section 22 of article X *of the state constitution*." Record at 7-8 (proposed § 39-28.6-106) (emphasis added). The referenced constitutional provision creating the preschool cash fund is contained in section 1 of the measure. Record at 2 (proposed Colo. Const. art. X, § 22(4)).

In other words, without the two constituent parts—constitutional and statutory—working in conjunction with each other, there would be no new preschool program to receive the new sales tax revenue generated by section 7. The constitutional and statutory amendments work together as a whole to fulfill #315's overarching single subject. The Board therefore did not abuse its drafting discretion when it crafted a title stating that the new vaping sales tax is brought about "by an amendment to the Colorado constitution ***and*** a change to the Colorado

Revised Statutes concerning a new preschool program[.]" Record at 15 (emphasis added).

While this Court may have drafted a different title in response to Haynes' arguments, that is not the proper inquiry. This Court grants "great deference" to the Board's drafting expertise, *In re #45*, 234 P.3d at 648, giving it discretion to resolve "interrelated problems of length, complexity, and clarity in setting a title[.]" *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014). "[I]f reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient." *Say v. Baker*, 137 Colo. 155, 159, 322 P.2d 317, 319 (1958). Thus, this Court should affirm.

B. The title adequately summarizes #315's funding sources.

As stated in the Board's opening brief, #315's reallocation of state cigarette and tobacco tax funds away from local governments that ban tobacco and nicotine products is not a central feature of the measure. Rather, it constitutes one of several funding mechanisms within #315. Haynes' opening brief cites no authority suggesting that a measure's title must lay out the detailed nuances of each of its many funding

sources, as opposed to only the general categories. *See In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund,* 823 P.2d 1353, 1355 (Colo. 1991) ("The board is not required to describe every nuance and feature of the proposed measure.").

The one case cited by Haynes actually supports the Board, not Haynes, demonstrating that the Board's title need not set forth every detail of the proposed measure. Haynes' Br. 25 (citing *In re Matter of Title, Ballot Title and Submission Clause for 2013-2014 #90*, 328 P.3d 155 (Colo. 2014)). In that case, this Court held that a measure expanding local governments' authority to regulate "oil and gas development" need not mention "hydraulic fracturing." 328 P.3d at 165. Hydraulic fracturing is just one example of oil and gas development, this Court explained, and omitting it from the title is not misleading to voters. *Id.*

So too here. The title set by the Board for #315 properly alerts voters to the general categories of the measure's funding: "a new tax on tobacco-derived nicotine vapor products," "reallocating" "existing

revenue from taxes on tobacco and nicotine products" and "money the state receives from tobacco litigation settlements" that previously went to "certain health-related programs" and "other state purposes." Record at 15. Omitting the details of one discrete funding source within #315 does not render the overall title misleading to voters, just as omitting "hydraulic fracturing" was not misleading in *In re #90*. Again, Board member Gelender summarized well the Board's thinking on this point when considering #315's related measure: "I don't think the complexity it [the local ban provision] adds to the title, or the difficulty, is worth the relatively minimal benefit in notice it's providing. … In a balance, it ends up being more of a distraction than an improvement."[4]

The level of detail settled on by the Board after a lengthy drafting process was well within its drafting discretion. *See In re #90*, 328 P.3d at 162. The Board's title both complies with the statutory requirement that titles "be brief," § 1-40-106(3)(b), C.R.S. (2019), and adequately informs voters of the measure's central features. Adding additional

[4] *Rehearing Before Title Board on Proposed Initiative 2019-2020 #293* (Apr. 15, 2020), *available at* https://tinyurl.com/y9pc2k5n (statement beginning at minute 3:01:20).

length or complexity as Haynes urges may cause frustrated voters to refrain from reading the title altogether. Applying this Court's deferential standard of review, the Board's title for #315 should be upheld. *See Say*, 137 Colo. at 159, 322 P.2d at 319.

C. Itemizing the programs that will see reduced funding under #315 is not required by the clear title rule.

For similar reasons, the Board's title need not specify each and every existing government program that will face reduced funding if #315's new preschool program is approved by the voters.

The reduction of funds for existing health-related programs is a mere effect of #315, not a central feature. Drafting a "brief" title that both summarizes #315's central features and identifies each of the 11 existing programs that will see reduced funding is simply not possible. Haynes' Br. 26. The Board appropriately exercised its drafting discretion when it elected to describe the general category of affected programs—"health-related programs and other state purposes"—rather than itemize each affected program individually. Record at 15; *see Matter of Title, Ballot Title for 1997-98 No. 62*, 961 P.2d 1077, 1082

(Colo. 1998) (stating "an item-by-item paraphrase" would undermine the General Assembly' intent for a "relatively brief and plain statement").

While Haynes now suggests that the Title Board should have identified the "key programs" that will be affected, Haynes' Br. 27, she does not explain how the Board is to determine which programs are "key programs" worthy of mention and which fall short of that threshold. Indeed, the Board has no principled way of making that type of normative judgment, and this Court's precedent cautions against it. *Cf. In re Title, Ballot Title, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 652 (Colo. 2010) (explaining the Court will disapprove of titles that express a "value judgment about the program").

Last, Haynes relies on *In re Matter of Title, Ballot Title, and Submission Clause for 2015-2016 #73*, 369 P.3d 565 (Colo. 2016), as an example of a case where this Court disapproved of a title that used mere "overarching generalities." Haynes' Br. 27. But Haynes overstates the holding of *In re #73*. The Court in that case disapproved of the title because five "central elements" of the measure pertaining to recall

elections were omitted. But here, the reduction of funds for existing health-related programs is not one of #315's central elements or features; it is a mere effect of the measure that need not be included in the title. *See In re Title Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916, 921 (Colo. 1982) ("There is no requirement that every possible effect be included within the title or the ballot title and submission clause."). Such effects are "capable of being brought to the attention of the voters by public debate," or through the more detailed format provided by the Blue Book. *Id.*

CONCLUSION

This Court should affirm the Title Board's actions in setting the title for #315.

Respectfully submitted this 29th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCE and/or via U.S. first class mail at Denver, Colorado this 29th day of May, 2020, addressed as follows:

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