

Pursuant to Colo. Rev. Stat. § 1-40-107(2), registered Colorado elector William Hunter Railey (“Petitioner”) respectfully petitions this Court to review the title, ballot title, and submission clause set by the Ballot Title Setting Board for Proposed Initiative 2019-2020 #295.

STATEMENT OF THE CASE

A. Procedural History of Proposed Initiative 2019-2020 #295

The Title Board conducted its initial public hearing and set the title for Initiative #295 on April 1, 2020. Petitioner filed his timely motion for rehearing on March 8, 2020. The Title Board considered the motion at its April 15, 2020 hearing and denied the motion for rehearing in full.

B. Jurisdiction

Petitioner now timely seeks review by this Court of the Ballot Title Setting Board’s action pursuant to Colo. Rev. Stat. § 1-40-107(2). Petitioner also attaches to his Petition for Review certified copies of the final Proposed Initiative, the Title and Submission Clause, Fiscal Impact Statement, and the Motion for Rehearing and ruling thereon.

GROUND FOR APPEAL

The Title for #295 set by the Title Board violates the legal requirements imposed on the Board to comply with the single subject requirement in Colo.

Const. art. V, § 1(5.5), and the clear title requirement in Colo. Rev. Stat. § 1-40-106(3)(b). The following is an advisory list of issues to be addressed in Petitioner's brief:

1. The Title Board lacked jurisdiction to set a title for Initiative #295 for it contains more than a single subject because it requires voter approval at a statewide general election for newly created or qualified enterprises that collect \$100 million in their first five years, and it imposes reductions in state spending on state programs when an enterprise exceeds the threshold and may be awaiting or has been denied voter approval.

2. The Title Board lacked jurisdiction to set a title for Initiative #295 because the initiative is incomprehensible, the Title Board acknowledged confusion about what the measure means, and did not understand the measure well enough to state a single subject in its title.

3. If the Title Board had jurisdiction to set a title for Initiative #295, the title it set is legally flawed because the title fails to inform voters of certain central elements of Initiative #295:

(a) The Title contains no reference to the requirement that voter approval for enterprises will require specific language in the ballot title.

(b) The Title does not alert the voter to what it means for an enterprise to become “qualified” within the first five fiscal years.

(c) The Title fails to notify voters that revenue collected for enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated in calculating whether an enterprise triggers the voter approval requirement.

PRAYER FOR RELIEF

Petitioner respectfully requests that, after consideration of the parties’ briefs, the Court determine that the Title Board lacked jurisdiction to set titles for the Proposed Initiative and order the Title Board to return this measure to the Proponents, in light of the initiative’s failure to comply with the single subject requirement in the Colorado Constitution. In the alternative, Petitioner asks the Court to direct the Title Board to correct the title to address the deficiencies outlined in the Petitioner’s Petition and briefs.

Respectfully submitted this 22nd day of April 2020.

TIERNEY LAWRENCE LLC

By: s/Martha M. Tierney
Martha M. Tierney, No. 27521
225 E 16th Ave., Suite 350
Denver, Colorado 80203
Phone Number: (720) 242-7577
E-mail: mtierney@tierneylawrence.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2020 a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2019-2020 #295** was filed and served via the Colorado Courts E-Filing System to the following:

Suzanne Staiert, Esq.
MAVEN LAW GROUP
1800 Glenarm Place, Suite 950
Denver, CO 80202 Phone:
sstaiert@mavenlawgroup.com
Attorneys for Petitioner

Michael Kotlarczyk, Esq.
Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Michael.kotlarczyk@coag.gov
Attorneys for Title Board

s/Martha M. Tierney

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DATE FILED: April 22, 2020 7:02 PM



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **JENA GRISWOLD**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, fiscal impact statement and abstract, motion for rehearing, and the rulings thereon of the Title Board for Proposed Initiative "2019-2020 #295 'Voter Approval Requirement for Creation of Certain Fee-Based Enterprises'".....

.....

IN TESTIMONY WHEREOF I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 16th day of April, 2020.

Jena Griswold

SECRETARY OF STATE



RECEIVED

MAR 12 2020

S. WARD
2:48 P.M.

Initiative 2019-2020 #295

Be it Enacted by the People of the State of Colorado:

Colorado Secretary of State

SECTION 1. In Colorado Revised Statutes, add 24-77-108 as follows:

24-77-108. Creation of a new fee-based Enterprise. In order to provide transparency and oversight to government mandated fees the People of the State of Colorado find and declare that:

- (1) After January 1, 2021, any state enterprise qualified or created, as defined under Colo.Const. Art. X, section 20(2)(d) with projected or actual revenue from fees and surcharges of over \$100,000,000 total in its first five fiscal years must be approved at a statewide general election. Ballot titles for enterprises shall begin, "SHALL AN ENTERPRISE BE CREATED TO COLLECT REVENUE TOTALING (full dollar collection for first five fiscal years) IN ITS FIRST FIVE YEARS...?"
- (2) Revenue collected for enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated in calculating the applicability of this section.

Ballot Title Setting Board

Proposed Initiative 2019-2020 #295¹

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer's Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than \$100 million within the first five fiscal years of the creation or qualification of the new enterprise.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer's Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than \$100 million within the first five fiscal years of the creation or qualification of the new enterprise?

Hearing April 1, 2020:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 11:57 a.m.

¹ Unofficially captioned “**Voter Approval Requirement for Creation of Certain Fee-Based Enterprises**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

RECEIVED

By Steven Ward at 4:33 pm, Apr 08, 2020

COLORADO TITLE SETTING BOARD

**IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR PROPOSED INITIATIVE 2019-2020 #295**

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2019-2020 #295

On behalf of William Hunter Railey, registered elector of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2019-2020 #295 ("Initiative #295") and as grounds therefore state as follows:

I. THE TITLE SET BY TITLE BOARD AT MARCH 4, 2020 HEARING

On April 1, 2020, the Title Board set the following ballot title and submission clause for Initiative #295:

Shall there be a change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer's Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than \$100 million within the first five fiscal years of the creation or qualification of the new enterprise?

II. GROUND FOR REHEARING

A. The Initiative Impermissibly Contains Several Separate and Distinct Subjects in Violation Single Subject and Clear Title Requirements.

Pursuant to Colo. Const. art. V, §1(5.5),

no measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

See also 1-40-106.5, C.R.S. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects." Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause 1990-2000 #104), 987 P.2d 249, 253 (Colo. 2000).

1. Initiative #295 Violates the Single Subject Requirement by Reducing State Spending on State Programs.

Initiative #295 purports to create a voter approval requirement for the new creation or qualification of state enterprises collecting revenue from fees and surcharges over \$100,000,000 in its first five fiscal years. A close review of the Initiative, however, reveals that not only does it establish a voter approval requirement for state enterprises, it also reduces state spending on state programs by requiring existing enterprises to cease being qualified to exist outside of Colo. Const. art. X §20 once they collect \$100,000,000 in their first five fiscal years without voter approval. Once an enterprise reaches the revenue threshold, it must obtain voter approval to continue to be an enterprise but that can occur only at a statewide general election – which may be two years in the future. Because of the spending and revenue limitations contained in TABOR, however, the state cannot increase either its overall spending or revenue collection to maintain the current level of spending on state enterprises. As a result, the Initiative will require the state to dedicate a portion of the state's current revenues to replace lost enterprise revenue that must be refunded under TABOR, and as a result the state must lower the amount it spends on state programs.

First, the Initiative requires voter approval at a statewide general election for enterprises that collect \$100,000,000 in their first five fiscal years. Second, the Initiative imposes reductions in state spending on state programs when an enterprise exceeds the threshold and may be awaiting or has been denied voter approval. These two subjects are distinct and have separate purposes. Requiring voter approval of certain enterprises is not "dependent upon and clearly related" to the state spending reductions. *See Outcalt v. Bruce*, 961 P.2d 456, 460-461 (Colo. 1998). Voters would be surprised to learn that by voting for voter approval of certain enterprises, which might include community colleges or paid family leave programs, they also had required the reduction, and possible eventual elimination, of these same or other state programs. *Id.* That type of hidden subject is not permitted under article V, section 1(5.5), of the Colorado Constitution.

“The single subject requirement is intended ‘to prevent surprise and fraud from being practiced upon voters’ caused by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016) (*quoting In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002)). The purpose is to “obviate the risk of ‘uninformed voting caused by items concealed within a lengthy or complex proposal’” *Id.* While the Initiative is not long, a measure can be “complex” without necessarily being “lengthy” – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can harbor the most pernicious surprises “coiled up in [its] folds.”

Here, Initiative #295 brings all these dangers.

2. Initiative #295 Violates the Single Subject Requirement Because the Title Board Cannot Comprehend the Initiatives Enough to State Their Single Subject in the Titles.

Initiative #295 violates the single-subject requirement because a clear title cannot be set setting forth a single subject of the measure. Initiative #295 is identical to Initiative 2019-2020-#273, with the addition of the words “from fees and surcharges” to describe the source of revenue for an enterprise. At the April 1st Title Board meeting when #295 was initially heard, the Proponents explained that the measure was the same as #273 but for that small change. Also, at the April 1st Title Board hearing, the Title Board recalled the discussion during the March 4th hearing on #273 and engaged in no further discussion. During the Title Board hearing on March 4, 2020, the Title Board expressed confusion about the meaning of the term “qualified” and the intent of the measure. Even the Proponents of the measure differed in their interpretation of the measure’s meaning. In cases such as this one, where the Title Board has acknowledged that it does not understand exactly what the Initiative purports to do, and as a result it does not understand the measure well enough to state its single subject in the title, the Initiative cannot be forwarded to the voters and must, instead, be returned to the proponent. *See Title v. Bruce*, 974 P.2d 458, 469 (Colo. 1999).

Even if the title substantially tracks the language found in the Initiative itself, “the source of a title’s language does not rule out the possibility that the title could cause voter confusion.” *In re Proposed Initiative on "Obscenity"*, 877 P.2d 848, 850 (Colo. 1994); *Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016); *see also In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999) (“Here, perhaps because the . . . proposed initiative [itself] is difficult to comprehend, the titles . . . are not clear.”).

Although the right of initiative is to be liberally construed, “[i]t merits emphasis that the proponents of an initiative bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider.” *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 57 (Colo. 2008) (citation omitted). In cases like this, where the initiative is incomprehensible, and the Board has acknowledged confusion about what the measure means, then there is no clear title that states a single subject and the Initiative must be returned to the Proponents.

B. The Ballot Title and Submission Clause Is Misleading, and Does Not Correctly and Fairly Express Its True Intent and Meaning.

The title of the Initiative is misleading and does not correctly and fairly express the initiatives' true intent and meaning. Section 1-40-106(3)(b), C.R.S. provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause. . . .

The title of Initiative #295 misleads the voters because there is no obvious connection between the title and the initiative and to understand the initiative based on this title will require “ingenious reasoning, aided by superior rhetoric.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 25*, 974 P.2d 458, 462 (Colo. 1999) (quoting *In re Breene*, 14 Colo. 401, 406, 24 P. 3, 4 (1890)).

For example, the title contains no reference to one of the central features of measure - the requirement that ballot titles for enterprises begin with the specific language, “SHALL AN ENTERPRISE BE CREATED TO COLLECT REVENUE TOTALING (full dollar collection for first five fiscal years) IN ITS FIRST FIVE YEARS?” The absence of this requirement in the title may impair a voter’s ability to determine whether to support or oppose the proposal.

Another central feature of the measure is that enterprises may “qualify” for the voter approval requirement after they have been in existence for up to five years. The measure does not define what “qualified” means and neither does the title. But voters will not understand from the title what it means to require voter approval of any “newly created or qualified state enterprise.”

Titles and submission clauses 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 for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). Here, the title for Initiative #295 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. See generally 1-40-106(3)(b); *see also In re Proposed Initiative on "Obscenity,"* 877 P.2d at 850-51.

The title for Initiative #295 does not enable voters to make an informed choice because it does not correctly and fairly express its true intent and meaning.

III. CONCLUSION

Based on the foregoing, William Hunter Railey requests a rehearing of the Title Board for Initiative 2019-2020 #295, because the initiative contains multiple subjects, the title is unclear and misleading to voters, and it fails to fairly express the initiative’s true meaning and intent. As a result, the Title Board lacks jurisdiction to set a title and should reject the measure in its entirety.

Respectfully submitted this 8th day of April 2020.

TIERNEY LAWRENCE LLC

By: /s/ Martha M. Tierney
Martha M. Tierney, Atty Reg. No. 27521
Tierney Lawrence LLC
225 E. 16th Avenue, Suite 350
Denver, Colorado 80203
Phone Number: (720) 242-7577
E-mail: mtierney@tierneylawrence.com

ATTORNEYS FOR OBJECTOR WILLIAM
HUNTER RAILEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of April, 2020, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2019-2020 #295** was filed and served via email to the following:

Suzanne Staiert
Maven Law Group
1800 Glenarm Place, Suite 950
Denver, CO 80202
sstaiert@mavenlawgroup.com

Attorneys for Proponents

/s/ Martha M. Tierney

Ballot Title Setting Board

Proposed Initiative 2019-2020 #295¹

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer's Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than \$100 million within the first five fiscal years of the creation or qualification of the new enterprise.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer's Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than \$100 million within the first five fiscal years of the creation or qualification of the new enterprise?

Hearing April 1, 2020:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 11:57 a.m.

Rehearing April 15, 2020:

Motion for Rehearing denied.

Hearing adjourned 11:09 a.m.

¹ Unofficially captioned “**Voter Approval Requirement for Creation of Certain Fee-Based Enterprises**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.



Legislative
Council Staff

Nonpartisan Services for Colorado's Legislature

Initiative # 295

INITIAL FISCAL IMPACT STATEMENT

Date: March 25, 2020

Fiscal Analyst: Greg Sobetski (303-866-4105)

LCS TITLE: VOTER APPROVAL REQUIREMENT FOR CREATION OF CERTAIN FEE-BASED ENTERPRISES

***Disclaimer.** This initial fiscal impact statement has been prepared for the Title Board. If the initiative is placed on the ballot, Legislative Council Staff may revise this estimate for the ballot information booklet (Blue Book) if new information becomes available.*

Summary of Measure

Beginning in 2021, the measure requires that voter approval be obtained in order for new programs to be created as state enterprises for the purpose of Article X, Section 20, of the Colorado Constitution (TABOR), and in order for existing state programs that are not enterprises to qualify as enterprises. The voter approval requirement applies if the program's projected or actual revenue from fees and surcharges exceeds \$100 million over the first five years for which the program will operate as an enterprise. For the purpose of making this determination, projected or actual revenue from enterprises created in the five preceding fiscal years and serving primarily the same purpose are added to the projected or actual revenue of the created or qualifying enterprise.

The measure also includes required language to be used in ballot titles for elections required under the measure.

Background

An enterprise is a government-owned business authorized to issue its own revenue bonds and receiving less than 10 percent of its revenue in grants from the state government and local government sources, combined. Examples of enterprises owned by the state government include public colleges and universities, the Colorado Lottery, and the Division of Parks and Wildlife.

Subsection (7) of TABOR limits the amount that a district, meaning the state government or a local government, may spend or save each year. Revenue collected in excess of the TABOR limit must be refunded to taxpayers unless voters approve a measure allowing the government to retain the excess. Because enterprises are excluded from the definition of a district, revenue collected by an enterprise may be spent or saved without affecting the amount available for the rest of the government.

The measure requires that the state government receive voter approval in order to create or qualify an enterprise that exceeds a certain revenue threshold. Under current law, enterprises may be created or designated by the General Assembly without voter approval, provided that they satisfy the other requirements. Programs designated as enterprises in state law may qualify or be disqualified from year to year if the revenue they receive from the state government and local governments combined fluctuates above and below 10 percent of total revenue to the enterprise.

State Revenue

The measure has no direct impact on state revenue. To the extent that the measure stops the creation or qualification of state enterprises, it may reduce the total amount of revenue collected in service charges paid to government-owned businesses.

State Expenditures

The measure increases workload for estimation of revenue to be collected by proposed enterprises and has no other direct impact on state expenditures. Workload in Legislative Council Staff will increase to estimate five-year revenue impacts for proposed enterprises rather than the two-year impacts usually estimated under current practice; this workload can be accomplished within existing appropriations.

To the extent that the measure results in the submission of more ballot questions to the state's voters, it will increase election-related workload in Legislative Council Staff, the Office of Legislative Legal Services, and the Department of State.

To the extent that the measure stops the creation or qualification of state enterprises, it may either reduce the total amount of state expenditures in policy areas that are unknown at this time and/or increase future General Fund obligations for TABOR refunds to taxpayers.

Local Government Impact

The measure does not affect the ability of local governments to create enterprises. To the extent that it results in the submission of more ballot questions to the state's voters, it will increase election-related workload for county clerks.

Economic Impact

The measure has no direct economic impact. To the extent that it causes policymakers to create fewer state enterprises, it will decrease state government services, potentially shifting a portion of economic activity from the public sector to the private sector.

Effective Date

If approved by voters at the 2020 general election, this measure takes effect upon proclamation of the Governor, no later than 30 days after the official canvass of the vote is completed.

State and Local Government Contacts

Legislative Council Staff Economics Section

Abstract of Initiative 295: VOTER APPROVAL REQUIREMENT FOR CREATION OF CERTAIN FEE-BASED ENTERPRISES

The abstract includes estimates of the fiscal impact of the proposed initiative. If this initiative is to be placed on the ballot, Legislative Council Staff will prepare new estimates as part of a fiscal impact statement, which includes an abstract of that information. All fiscal impact statements are available at www.ColoradoBlueBook.com and the abstract will be included in the ballot information booklet that is prepared for the initiative.

This initial fiscal estimate, prepared by the nonpartisan Director of Research of the Legislative Council as of March 2020, identifies the following impacts:

State revenue. The measure has no direct impact on state revenue.

State expenditures. The measure increases workload for estimation of revenue to be collected by proposed enterprises and has no other direct impact on state expenditures.

Local government impact. The measure has no direct impact on local governments.

Economic impacts. The measure has no direct economic impact. To the extent that it causes policymakers to create fewer state enterprises, it will decrease state government services, potentially shifting a portion of economic activity from the public sector to the private sector.