

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019- 2020 #295 Petitioner: WILLIAM HUNTER RAILEY v. Respondents: MICHAEL FIELDS and LINDSEY SINGER and Title Board: THERESA CONLEY; DAVID POWELL; and JASON GELENDER	▲ COURT USE ONLY ▲
<i>Attorneys for Petitioner</i> Martha M. Tierney, No. 27521 Tierney Lawrence LLC 225 E.16 TH AVE, SUITE 350 Denver, CO 80203 Phone: (720) 242-7577 E-mail: mtierney@tierneylawrence.com	Case No.: 2020SA328
PETITIONER'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 C.A.R. 28(g). It contains 2331 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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 (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

X 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.

By: s/Martha M. Tierney

TABLE OF CONTENTS

Page(s)

SUMMARY OF ARGUMENT3

ARGUMENT3

 I. The Initiative Violates the Single Subject Requirement3

 A. Standard of Review3

 B. The Initiative Violates the Single Subject Requirement By
 Reducing State Spending on State Programs.....3

 C. The Initiative Violates the Single Subject Requirement
 Because the Title Board Could Not Comprehend the Initiative
 Enough to State Its Single Subject in Title.....6

 II. The Initiative’s Title Does Not Correctly and Fairly Express the
 True Intent and Meaning of the Measure8

 A. Standard of Review8

 B. The Title and Submission Clauses Are Misleading.....9

CONCLUSION11

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Hayes v. Ottke</i> , 293 P.3d 551 (Colo. 2013)	3, 6, 7
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 25</i> , 974 P.2d 458 (Colo. 1999)	3
<i>Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)</i> , 374 P.3d 460 (Colo. 2016)	3, 5
<i>In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43</i> , 46 P.3d 438 (Colo. 2002)	3
<i>In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #3</i> , 442 P.3d 867 (Colo. 2019)	4
<i>In re Proposed Initiative 1996-4</i> , 916 P.2d 528 (Colo. 1996)	4
<i>Outcelt v. Bruce</i> , 959 P.2d 822 (Colo. 1998)	5
<i>Outcelt v. Bruce</i> , 961 P.2d 456 (Colo. 1998)	6
<i>In re Title & Ballot Title & Submission Clause for 2005-2006 # 55</i> , 138 P.3d 273, 278 (Colo. 2006)	7
<i>Title v. Bruce</i> , 974 P.2d 458 (Colo. 1999)	7
<i>In re Breene</i> , 24 P. 3, 4 (Colo. 1890)	7
<i>Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)</i> , 333 P.3d 101 (Colo. 2014)	8
<i>Hayes v. Spalding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)</i> , 369 P.3d 565 (Colo. 2016)	8, 9

In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on “Obscenity,” 877 P.2d 848 (Colo. 1994)9, 10, 11

In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238 (Colo. 1990)10

Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156), 413 P.3d 151 (Colo. 2016) 11

In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #44, 977 P.2d 856 (Colo. 1999)..... 11

STATUTES

§ 1-40-107(2), C.R.S (2019). 1

CONSTITUTIONAL PROVISIONS

Colo. Const. art. V, Section 1(5.5) 6

Colo. Const. art. X, Section 20.....1, 9

Colo. Const. art. X, Section 20(2)(d)..... 5

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

SUMMARY OF ARGUMENT

The Title Board erred in determining that Initiative #295 contains a single subject. The Initiative purports to create a voter approval requirement for newly qualified or created state enterprises collecting revenue from fees and surcharges over \$100,000,000 total 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 that “qualify” to be stripped of enterprise status pursuant to Colo. Const. art. X §20 until they obtain voter approval.

The Title Board acknowledged that it does not understand exactly what the term “qualified” means in the measure or what the Initiative purports to do. When the Title Board does not understand the measure well enough to state its single subject in the title, then the Initiative cannot be forwarded to the voters and must, instead, be returned to the proponents.

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. The title for Initiative #295 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title contains no information or indication that the measure would by its terms affect existing enterprises that may “qualify” sometime over the course of a five-year window. To the extent that voters may understand or have a sense of what it would mean to require voter approval of an existing enterprise (such as a community college or a paid family leave program) they are given no information or clue by the title how this “qualify” trigger operates.

Additionally, the title contains no reference to one of the central features of measure - the requirement that ballot titles for enterprises begin with specific language. Finally, 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.

Initiative #295 should be set aside because the measure violates the single subject requirement and the title as set is misleading, therefore, the decision of the Title Board should be overturned.

ARGUMENT

I. THE INITIATIVE VIOLATES THE SINGLE SUBJECT REQUIREMENT.

A. Standard of Review.

The Title Board and the Respondents partially state the correct standard of review but leave out "if the Board cannot comprehend a proposed initiative sufficiently to state its single-subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *Hayes v. Ottke*, 293 P.3d 551, 555 (Colo. 2013), quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 25*, 974 P.2d 458, 465 (Colo. 1999).

Both Respondents and the Title Board agree that Petitioner preserved this issue for appeal.

B. The Initiative Violates the Single Subject Requirement by Reducing State Spending on State Programs.

"[T]he 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).

In their Opening Brief, Respondents contend that Initiative #295 cannot have a second subject because this “Court has ruled that voting requirements [for an increase in debt, increase in taxes or to keep excess revenue above the growth cap] can be repealed as a singled subject.” *See Respondents Open. Brf., p. 17-18.* For this proposition, the Respondents rely upon *In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #3*, 442 P.3d 867 (Colo. 2019). This reliance is misplaced. In *In re Initiative for 2019-2020 #3*, this Court held that a one-sentence initiative asking voters if they wanted to repeal TABOR in its entirety contained a single subject. *Id.* at 873. In so holding, this Court distinguished *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533 (Colo. 1996), an initiative to repeal and replace parts of TABOR, because the initiative required voters to vote yes on all of the individual and expressly identified subjects or no on all of them, even though some voters might have preferred to vote yes on some and no on others – a scenario the single subject requirement was designed, in part, to avoid. *In re Initiative for 2019-2020 #3*, 442 P.3d at 871.

In contrast to the TABOR repeal initiative contained in *In re Initiative for 2019-2020 #3*, Initiative #295 purports to create a voter approval requirement for newly qualified or created state enterprises collecting revenue from fees and surcharges over \$100,000,000 total in its first five fiscal years. In doing so, the

Initiative also reduces state spending on state programs by requiring existing enterprises that “qualify” to be stripped of TABOR-exempt enterprise status until after they obtain voter approval. These are two separate subjects, and the separate subject is coiled up in the folds of the measure and will lead to voter surprise and fraud. *See Johnson*, 374 P.3d at 464.

Respondents and the Title Board contend that Petitioner’s arguments are merely effects of the measure that the Court should not consider at this stage.

Respondents’ Open. Brf. at pp. 18-19; Title Board Open. Brf. at p. 6.

Petitioner’s arguments, however, are not about the effects of the measure, but rather highlight how the measure’s multiple subjects could result in voter surprise or fraud. *See Outcalt v. Bruce*, 959 P.2d 822, 827 (Colo. 1998). When voters approved TABOR in 1992, they exempted enterprises that met certain conditions from TABOR’s spending cap. Colo. Const. art. X, §20(2)(d). While couched as merely a requirement for voter approval, Initiative #295 instead alters the law governing existing enterprises (and new enterprises too) by removing the TABOR exemption from those enterprises, if they collect revenue from fees and surcharges over \$100,000,000 in the first five fiscal years of operation, until they can be approved at the next general election. And because of the spending and revenue limitations contained in TABOR, the state may be unable to increase either its

overall spending or revenue collection to maintain the current level of spending on state entities that have been stripped of enterprise status.

When considering Initiative #295, 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. *See Outcalt v. Bruce*, 961 P.2d 456, 460-461 (Colo. 1998). That type of hidden subject is not permitted under article V, section 1(5.5), of the Colorado Constitution.

C. The Initiative Violates the Single Subject Requirement Because the Title Board Could Not Comprehend the Initiative Enough to State Its Single Subject in the Title.

To set a title, the Title Board must have a sufficient comprehension of the proposed initiative to enable it to express the measure's single subject. *See Hayes*, 293 P.3d at 555. Initiative #295 violates the single-subject requirement because a clear title cannot be set setting forth a single subject of the measure. As described in *Petitioner's Opening Brief at pp. 10-12*, the Title Board questioned the meaning of the term "qualified" in the measure and how the measure treated an enterprise that "qualified" during a 5 year cycle when it had been operating for a time (i.e. a community college), and how the measure operated in regard to enterprises that

may “requalify” as they go in and out of enterprise status.¹ *March 4, 2020 Hearing Audio at time stamps 3:58:49 – 4:08:32*. These were not Title Board questions asking about the potential legal effects of the measure but rather about how the measure operates and what the measure means. The Proponents were unable to answer these questions and the plain language of the measure does not answer them either. *Id.* By failing to describe or define the term “qualify,” the Initiative fails to inform voters and the Title Board of policies its passage will change. *See In re Initiative for 2005-2006 # 55*, 138 P.3d 273, 280-82 (Colo. 2006).

“[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single-subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters.” *Hayes*, 293 P.3d at 555. “Before a clear title can be written, the Board must reach a definitive conclusion as to whether the initiatives encompass multiple subjects.” *Title v. Bruce*, 974 P.2d 458, 468 (Colo. 1999), *citing In re Breene*, 24 P. 3, 4 (Colo. 1890) (noting that the title of an initiative cannot rest upon a merely possible or doubtful inference).

Here, neither the Title Board nor the Respondents appeared to understand what the measure does. In cases like this, where the initiative is incomprehensible,

¹ The audio for the March 4, 2020 Title Board hearing on Initiatives #273-#275 can be found at https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151

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.

II. THE TITLE DOES NOT CORRECTLY AND FAIRLY EXPRESS THE TRUE INTENT AND MEANING OF THE MEASURE.

A. Standard of Review.

The Title Board and the Respondents state the correct standard of review for review of a title, including that “the title should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to intelligently determine whether to support or oppose such a proposal.” *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). The Title Board and the Respondents leave out that this Court’s “role is to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *Hayes v. Spalding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)*, 369 P.3d 565, 569 (Colo. 2016).

The Title Board and the Respondents agree that Petitioner preserved this argument for appeal.

B. The Title and Submission Clauses Are Misleading.

A typical voter, with little time to learn the details and subtleties of the operation of enterprises or the evolution and interpretations of Colo. Const. art. X, §20, would have no way to understand from the title for Initiative #295, as set, the information necessary to make an informed decision as to the meaning of a “yes” or “no” vote.

A 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 Title Board dismisses (and the Respondents ignore) that this key feature is something that voters will not understand when confronted with the title as written. Notably absent from the title is any information or indication that the measure would by its terms affect existing enterprises that “qualify” sometime over the course of a five-year window. To the extent that voters may understand or at least have a sense of what it would mean to require voter approval of an existing enterprise, (such as a community college or a paid family leave program), they are given no information or clue by the title how this “qualify” trigger works.

Based upon the Title, voters will not have adequate information “to determine intelligently whether to support or oppose such a proposal.” *Hayes v. Spalding*, 369 P.3d at 570, citing *In re Title, Ballot Title, Submission Clause &*

Summary Pertaining to a Proposed Initiative on "Obscenity," 877 P.2d 848, 850-51 (Colo. 1994).

Additionally, the title contains no reference to one of the impactful features of measure - the requirement that ballot titles for enterprises requiring voter approval 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 central provision of the measure in the title may impair a voter's ability to determine whether to support or oppose the proposal.

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.

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.” *Id.* at 850; *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.").

CONCLUSION

The Petitioner respectfully requests that the Court overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #295.

Respectfully submitted this 20th day of May 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 20th day of May 2020 a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF** 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
Attorney for Respondents

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

*s/Martha M. Tierney*_____