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2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3">DATE FILED: May 6, 2020 5:53 PM

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<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>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</td></tr>
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<tr><td colspan="2">PETITIONER’S OPENING BRIEF</td></tr>
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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 3682 words.

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

For the party raising the issue:

X 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:

☐ 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.AR. 32.

By: s/Martha M. Tierney

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CONSTITUTIONAL PROVISIONS

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board lacked jurisdiction to set a title for Initiative #295 for violating the single subject requirement 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. Whether 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. Whether the title is misleading because the title fails to inform voters of certain central elements of Initiative #295, including:

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

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

STATEMENT OF THE CASE

This is an appeal from the Title Board's setting of the Title for proposed Initiative 2019-2020 #295. The Title Board conducted its initial public hearing and set the title for the Initiative on April 1, 2020. Petitioner timely filed his motion for rehearing on April 8, 2020. The Title Board considered the motion at its April 15, 2020 hearing and denied the motion for rehearing in full. Petitioner William Hunter Railey filed a Petition for Review for Initiative #295 pursuant to C.R.S. §1-40-107(2) on April 22, 2020.

STATEMENT OF FACTS

The Initiative requires statewide voter approval at a statewide general election of all state enterprises 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 in the first five fiscal years, with a ballot title that must begin, "SHALL AN ENTERPRISE BE CREATED TO COLLECT REVENUE

TOTALING (full dollar collection for first five fiscal years) IN ITS FIRST FIVE YEARS...?" The Initiative also requires that revenue collected for enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated in calculating whether the voter approval requirement is triggered.

The Title set for Initiative #295 at the hearing on April 1, 2020 reads:

> 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.

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 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 clue that the measure would by it terms affect existing enterprises that “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 works.

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.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Smith v. Hayes (In re Title, Ballot Title and Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 320 (Colo. 2017), quoting *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 136, 141 (Colo. 2014). "We will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*, quoting *Cordero, supra*. Though neither addressing the merits nor potential applications of a proposed initiative, "we must examine their wording to determine whether the initiatives and their titles comport with the single subject

and clear title requirements." *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). "In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning." *Id*.

This court must "sufficiently examine an initiative to determine whether a measure violates the single subject rule[.]" and, "when necessary, characterize a proposal sufficiently to enable review of the Board's actions." *In re Title & Ballot Title & Submission Clause for 2005-2006 # 55*, 138 P.3d 273, 278 (Colo. 2006) (collecting cases).

Petitioner preserved this argument in his Motion for Rehearing at pp. 1-3.

B. <u>The Single Subject Requirement</u>.

Colo. Const. art. V, §1(5.5)'s requirement that a proposed initiative contain only a single subject serves two functions. "First, the single subject requirement 'is intended to ensure that each proposal depends upon its own merits for passage.'" *Johnson*, 374 P.3d at 465, quoting *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995). As with the similar requirement applicable to bills passed by the General Assembly, this "prevents proponents from engaging in 'log rolling' tactics, that is, combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have

different or even conflicting interests." *Johnson*, *id*., *citing* §1-40-106.5(1)(e), C.R.S. (2019).

Second – and equally important – "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, id*., quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). As noted in *In re 2001-2002 #43*, 46 P.3d at 442-43, the purpose is to "obviate the risk of 'uninformed voting caused by items concealed within a lengthy or complex proposal'" (quoting *Public Rights in Waters II*, 898 P.2d at 1079). As is clear from the Court's words, 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."

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

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 ("TABOR") until they obtain voter approval.

Once an enterprise reaches the $100 million revenue threshold during the first five fiscal years of operation, 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. During this waiting period, the revenues collected by an entity that has been stripped of enterprise status will necessarily be included in the state's overall fiscal year spending limits and subject to the TABOR cap. 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 entities that have been stripped of enterprise status.

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. 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 required by the measure. *See Outcelt 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.

Importantly, this conclusion arises from a facial reading of the Initiative and is not an attempt to predict the possible legal consequences that may occur if the Initiative actually becomes law. *See Outcelt v. Bruce*, 961 P.2d 456, 460 n. 5 (Colo. 1998). Instead, this analysis is limited to identifying and characterizing the Initiative and analyzing the operation of the "any state enterprise qualified or created" language. *Id.*

On the one hand, the breadth of a measure does not necessarily indicate a multiplicity of purposes. *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). Nor must a measure provide "a full accounting of potential effects" to avoid the risk of voter surprise. *Bentley v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 632 (Colo. 2016). Yet, this Court has never countenanced the deliberate embedding of unrelated purposes in a single measure in a manner likely to deceive or confuse the voting public. *Cf.*, *Howes v. Brown (In re Title, Ballot Title & Submission Clause for 2009-2010 #91)*, 235 P.3d 1071, 1088 (Colo. 2010) (Coats, J., dissenting). Nor would this Court be expected to approve the embedding of disconnected purposes in a single measure to precisely the same effect (confusion or surprise) from the perspective of the voting public. The Initiative here presents that problem.

2. 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.

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 withdrawn proposed Initiative 2019-2020- #274, 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 the hearing for Initiative #295 was initially heard, the Respondents explained that measures #294-#296 were the same as measures #273 - #275 but for that small change.[1] *April 1, 2020 Hearing Audio at time stamps 1:43:53 – 1:45-40.*

At the April 15th Title Board rehearing on Initiative #295, the Petitioner, the Respondents and the Title Board incorporated their comments and the discussion from the March 4th hearing and March 25th rehearing on #273 - 275 and engaged in no further discussion.[2] *April 15, 2020 Rehearing Audio at time stamps 2:06:14 – 2:06:34; 2:06:39 – 2:06:51; 2:06:52 – 2:06:58.*

During the Title Board hearing on March 4, 2020 for #274, the Title Board expressed confusion about the meaning of the term "qualified" and the intent of the measure.[3] *March 4, 2020 Hearing Audio at time stamps 3:58:49 – 4:08:32*. Even the Proponents of the measure differed in their interpretation of the measure's meaning. *Id.* 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

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[1] The audio for the April 1, 2020 Title Board hearing on Initiative #294 can be found at: https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=159
[2] The audio for the April 15, 2020 Title Board rehearing on Initiative #294 can be found at: https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=165.
[3] 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

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).

When the Title Board, by way of example, asked the Proponents whether a college that became qualified as an enterprise would cease to exist if voters do not vote to approve the enterprise, the Proponents first said "yes" but then said it would exist, but just not be exempt from TABOR. *March 4, 2020 Hearing Audio at time stamps 4:00:15 - 4:03:02*. At the same hearing, one Proponent admitted: "I just don't know the answer to that if there is a creation, qualification or requalification." *Id. at time stamp 4:01:44 - 4:01:46.* No one, including the Proponents, appears to understand what the measure does.

The provision in the Initiative that impacts enterprises previously created (even those created before the Initiative passes) but only newly "qualified" is confusing and difficult to comprehend. When considering the Initiative, voters could be enticed to vote for the measure in order to require voter approval of future enterprises while not realizing that passage of the measure would simultaneously achieve a purpose not necessarily related to future enterprises. *See Outcelt v. Bruce*, 959 P.2d 822, 827 (Colo. 1998). Because the Initiative impermissibly contains more than one subject, the Title Board should not have fixed the titles

and summary. *Id.*

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.

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

A. Standard of Review.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Cordero*, 328 P.3d at 141. "The Title Board is vested with considerable discretion in setting the title and ballot title and submission clause. [citations omitted] We will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading." *Id*. "In our limited review of the Title Board's actions, we do not address the merits of the proposed initiatives nor suggest how they might be applied if enacted." *Id.* at 142.

"In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning." *Id*. "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*, 333 P.3d at 105. While every detail of a proposal need not be spelled out, "[t]he Title Board must 'set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation.'" *Bentley*, 370 P.3d at 634, quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 256 (Colo. 2000). "[O]ur 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). Petitioner preserved this argument in his Motion for Rehearing at pp. 3-4.

B. <u>The Title and Submission Clauses Are Misleading</u>.

As discussed in Part I, above, Petitioner submits that the Initiative contains two or more separate and distinct purposes and subjects "coiled up in the folds" of the wording of the measure. These distinct purposes matter greatly and are not readily apparent from either the wording of the measure itself nor from the title

(that faithfully replicates the wording of the measure). A typical voter, with little time to swim through 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 garner from the titles, as set, the information necessary to make an informed decision as to the meaning of a "yes" or "no" vote.

Even were the Court to conclude that the Initiative is confined to a single subject, that does not resolve the issue of whether its true intent and meaning is clearly and fairly expressed in the title. *Cf., Hayes*, 369 P.3d at 568-71. The fact that the title tracks the wording used in the measure is not sufficient to ensure that voters have adequate information "to determine intelligently whether to support or oppose such a proposal." *Id*. at 570, citing *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on "Obscenity,"* 877 P.2d 848 (Colo. 1994). It is particularly important to ensure that the titles "alert voters to the fact that some of the proposed changes would significantly alter" present law. *Hayes*, 369 P.3d at 570.

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. Notably absent from the title is any information or clue that the measure would by it terms affect existing enterprises that "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 works.

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 Proponents respectfully request the Court to overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #295.

Respectfully submitted this 6th day of May 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2020 a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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